(16,324.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 192.

DANIEL DULL AND NELLIE M. DULL, PLAINTIFFS IN ERROR,

vs.

JOHN E. BLACKMAN, ED. PHELAN, E. R. DUFFIE, AND GEORGE F. WRIGHT.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 21, 1897.

a Pleas before the supreme court of Iowa in a cause therein tried and determined between John E. Blackman, plaintiff and appellee, and George F. Wright and others, defendants, and Ed. Phelan, intervenor, appellees, and Daniel Dull and Nellie M. Dull, defendants, appellants.

Be it remembered that on the 22d day of December, 1894, there was filed in the office of the clerk of the supreme court of Iowa appellants' abstract of the record in the words and figures following, to wit:

1 "In the Supreme Court of Iowa, January Term, 1895.

JOHN E. BLACKMAN, Appellee,
vs.
GEORGE F. WRIGHT, A. W. ASKWITH, E. R. DUFFIE, Ed. Phelan, Intervenor, Appellees, and Daniel Dull and Nellie M. Dull, Appellants. } In Equity.

Appeal from Pottawattamie county district court—Hon. H. E. Deemer, judge.

Flickinger Bros., attorneys for appellants.
E. R. Duffie and Wright & Baldwin, attorneys for appellees.

Appellants' Abstract of Record.

2 Be it remembered, that on the 29th day of February, 1892, the plaintiff, John E. Blackman, files his

Petition in Equity,

alleging:—

1st. For a cause of action against the defendant the plaintiff states that on and prior to the 2nd day of August, 1889, he was the owner in fee of the following-described real estate, situated in the county of Pottawattamie, State of Iowa, to wit:

The S. ½ of section 4, the N. E. ¼ of section 9, the N. E. ¼ of the S. E. ¼ of section 9, and about 31.06 acres of the S. E. ¼ of the S. E. ¼ of section 9, more particularly described as follows:

Commencing at the southeast corner of section 9, thence north 80 rods, thence west 32 rods, to the centre of Mosquito creek, thence along the centre of the channel of Mosquito creek to the south line of section 9, thence east 74 rods to the place of beginning, all of said above-described land being in township 76, range 42.

2nd. That on the 19th day of July, 1889, the plaintiff being in need of funds to be used in the prosecution of an enterprise in the city of New York, made and entered into an oral agreement with the defendant at the said city of New York, by the terms of which the defendant was to furnish and advance to the plaintiff moneys as they might be needed and called for, not to exceed the sum of

$10,000 and as security for the repayment of any and all moneys so advanced by the defendant to the plaintiff, the plaintiff
3 agreed to make, execute and deliver to the defendant a deed to the above-described premises, which deed was to be accepted and recorded by the defendant upon the execution of a statement in writing signed by the defendant, showing the terms and conditions upon which he took title to said land from the plaintiff.

3rd. It was a further part of said agreement entered into between the parties that the defendant might sell the lands above described, first obtaining the plaintiff's consent to the terms and conditions of the sale, and that he might execute a deed to the purchaser of any of said lands so sold, and after deducting from the purchase price received therefor the sum or sums of money which he had at that date actually advanced to the plaintiff under said agreement, with interest from the date of such advancement to the date when the purchase-money from the sale of said lands should be received by the defendant, that he should then pay the balance, if any, over to this plaintiff.

4th. It was a further condition of said agreement that defendant should take possession of all of said land, rent the same on the best terms possible, and after paying the taxes and assessments against the same account to the plaintiff for any balance of such rents so received by him.

5th. It was a further condition of said agreement that if said lands should not be sold by the defendant, that then and in that case, whenever the plaintiff repaid to the defendant the sum or sums of money advanced and received by him, with interest thereon from the date of advancement to the date of payment, that the defendant would reconvey said lands to the plaintiff.

6th. The plaintiff further states that on or about the 2nd
4 day of August, 1889, he made a deed to said lands to the defendant, and delivered the same to one Charles Haldane, in the city of New York, together with the memoranda containing the terms and the conditions upon which the defendant was to hold the title to said land, for delivery to the defendant, and to be accepted and recorded by him only upon signing and returning to the plaintiff the memoranda aforesaid.

7th. That said deed of conveyance and said memoranda were by the said Haldane transmitted by mail to the said defendant, at Council Bluffs, Iowa, and the defendant received and recorded the said deed of conveyance, but neglected and refused to sign and deliver to the plaintiff the memoranda or writing showing the conditions upon which he took the conveyance to said land.

8th. That notwithstanding said Wright took said deed of conveyance, and caused the same to be recorded, he has, at all times since the date thereof, neglected and refused to advance to the plaintiff any part of the $10,000 to be advanced by him, and for which he took said conveyance as security, and has wholly failed and refused to sign and deliver to the plaintiff any writing showing the terms and conditions upon which he took the conveyance to said premises.

9th. That on many occasions prior to the commencement of this action the plaintiff has demanded from the defendant a reconveyance of said premises, but the defendant has at all times neglected and refused to make a reconveyance thereof.

10th. That the defendant has no equitable interest in said land and never did have. That all the right or interest he has
5 therein was by virtue of said agreement above set forth, the terms of which he has never fulfilled on his part, and that the plaintiff is entitled to a reconveyance of said premises without the payment to the defendant of any sum of money whatever.

11th. That the defendant since the conveyance to him, above mentioned, has had possession of the land aforesaid, and has received the rents and profits thereof, amounting to about $3,000, and that he has wholly failed and refused to account to the plaintiff for said rents and profits.

12th. Wherefore the plaintiff prays that the defendant may be required to reconvey to the plaintiff the premises first hereinbefore described, and that in case of his neglect or refusal so to do, within a time to be fixed by the court, that then the clerk of this court be appointed a commissioner to make such conveyance, and that an accounting be had of the rents and profits of said land, received by the defendant, and that the plaintiff have judgment against him therefor, and that the plaintiff have such other and further relief in the premises as justice and equity may require.

JOHN E. BLACKMAN, *Plaintiff.*

STATE OF NEBRASKA, } ss:
Douglas County, }

E. R. Duffie, being first duly sworn, deposes and says that he is one of the attorneys for the plaintiff in the above-entitled cause; that he has personal knowledge of the facts above set forth, from conversation with both parties, and that he verily believes the facts above set forth are true.

E. R. DUFFIE.

6 Subscribed in my presence and sworn to before me, this 27th day of February, A. D. 1892.

[SEAL.] JOHN L. CARR,
Notary Public, Douglas County, Nebraska.

And on the *17th day of September, 1892*, Edward R. Phelan files his

Petition of Intervention

as follows:

In the District Court of Pottawattamie County, State of Iowa.

JOHN E. BLACKMAN, Plaintiff, }
vs.
GEORGE F. WRIGHT *et al.*, Defendants. }

Comes now Edward Phelan, and intervening in the case above entitled, shows to the court that he is interested in the subject-

matter of the action as against all the defendants, and that his interest therein arises as follows, to wit:

Paragraph 1. On the 30th day of January, 1892, the plaintiff, John E. Blackman, was the equitable owner of all the lands described in his petition filed herein, and on said day he made, executed and delivered to this intervenor a deed of all of said lands, which said deed contained general covenants of warranty and was absolute in form, but was intended nevertheless to secure the repayment to intervenor of certain moneys that day loaned and advanced to the said Blackman, and certain sums due one E. R. Duffie
7 for legal services then performed and thereafter to be rendered the said Blackman, and $1,000, more or less, due E. P. Savage from said Blackman.

Paragraph 2. That thereafter, and on the 14th day of September, 1892, this intervenor purchased said lands from the said Blackman, and by the terms of said purchase said deed of January 29, 1892, was to stand as an absolute deed and to convey to this intervenor the full, absolute and *and* unquali-ed title to the land therein described, and the said Blackman was to and did release to this intervenor any and all claim of right, title or interest theretofore held by him in or to said lands.

Paragraph 3. Intervenor further shows to the court that prior to the commencement of this action, and on the 2nd day of August, 1889, the said John E. Blackman, and Mary, his wife, conveyed all the lands in plaintiff's petition described, to the defendant, George F. Wright, by special warranty deed; that said conveyance while absolute in form was intended as a mortgage to secure to the said George F. Wright the payment of moneys he might thereafter advance to the said Blackman, not exceeding in amount the sum of ten thousand dollars, the agreement between the said Blackman and the said Wright in relation to said deed and conveyance being oral and to the effect that the said Wright should loan and advance to the said Blackman sums of money from time to time as the needs of said Blackman might require, not, however, to exceed in the aggregate the sum of ten thousand dollars, and the said Blackman on his part agreed to and did convey to said Wright the lands described in the plaintiff's petition, as security for the money so agreed to be advanced by the defendant, and it was a further part of said parol agreement that the defendant, while he held the title to said
8 lands, might on consent of plaintiff, first had, sell the same, or portions or parcels thereof, at not less than their fair market value, and apply the proceeds of such sales to the credit of said Blackman and the repayment of any sums by him advanced to Blackman under said agreement.

Paragraph 4. Intervenor further shows to the court that the defendant never loaned or advanced to the plaintiff any money in any amount under the agreement set forth in paragraph 3 hereof, and that the plaintiff is not now, nor has he at any time been indebted to the defendant in any amount whatever, but on the contrary, defendant is indebted to plaintiff in a large amount on account of the rents and profits received from said land since the making of said

deed, and intervenor charges the fact to be that while the legal title to all the land in plaintiff's petition described is held by said Wright he is not the equitable owner thereof, but that the plaintiff from the time of conveying said lands to defendant up to the time that this intervenor took a conveyance from him, was the full, equitable owner of all of said lands and entitled to conveyance of the legal title thereof from the said Wright, and intervenor is now the equitable owner of said lands, and the defendant should in equity and good conscience convey to him the legal title thereto.

Paragraph 5. Intervenor states that on the — day of February, 1886, one Daniel Dull was the owner of all the lands in plaintiff's petition described, and a large body of other lands, amounting altogether to about 1,400 acres, and that on said date he mortgaged the same to one W. W. Holcomb to secure a loan of $10,800, due in two years from the date of said mortgage, with 6 per cent. interest thereon. That the lands conveyed by said mortgage are the
9 following, to wit: S. W. ¼ section 10; S. E. ¼ of S. E. ¼ section 3; S. ½ of S. W. ½ of section 3; S. W. ¼ section 4; E. ½ of N. E. ¼ section 9; N. E. ¼ of S. E. ¼ section 9; W. ½ of N. E. ¼ section 10; N. W. ¼ of N. W. ¼ of S. E. ¼ section 10; N. E. ¼ of N. W. ¼ section 3; S. E. ¼ of N. E. ¼ section 3; W. ½ of S. E. ¼ section 3; S. E. ¼ of S. E. ½ section 3; N. ½ of S. W. ¼ section 3; S. E. ¼ of section 4; W. ½ of N. E. ¼ section 9; S. E. ¼ of S. E. ¼ section 10, and 31 and $\frac{8}{10}$ acres out of the S. E. ¼ of S. E. ¼ section 9, more particularly described as follows, to wit: Commencing at the S. E. corner section 9; running thence north eighty (80) rods; thence west thirty-two (32) rods to the center of Mosquito creek, thence along the center channel of said creek to the south line of said section nine (9); thence east seventy-four (74) rods to the place of beginning. All of said lands being in township 76 of range 42 west of the fifth principal meridian, and containing altogether 1,386 acres of land as per Government survey.

Paragraph 6. That the said Daniel Dull, as your petitioner is informed from the records of this county, and charges the fact to be, is still the owner of all the lands in said mortgage described, excepting those described in plaintiff's petition, which he sold and conveyed to the plaintiff in this action on the 5th day of June, 1889, and excepting also the S. E. ¼ of S. E. ¼ of section 10, above described, which was sold by said Dull in 1889, and by Holcomb released from the lien of his mortgage, and the intervenor charges the fact to be that the lands covered by said Holcomb mortgage and still owned by said Dull are of the value of $30,000 or more, and good and ample security for any amount due in said mortgage. That intervenor does not know and cannot ascertain what amount is now due on the said mortgage indebtedness, said Holcomb
10 refusing to disclose the same to the plaintiff herein, but the said Holcomb refuses to take any steps to foreclose his said mortgage or to collect the amount due thereon from the said Dull, although the same is long past due, and claims to hold the land in plaintiff's petition described with the other lands included therein as security for his debt, and by refusing to take steps to enforce the collec-

tion thereof, is allowing the same to accumulate and increase, to the prejudice of intervenor if his lands should ultimately become liable for the same or any part thereof.

Paragraph 7. Intervenor further states that the lands covered by said Holcomb mortgage and still owned by said Dull, are and were at the date of the execution of said mortgage of greater value per acre than the lands in plaintiff's petition described, and if said last-mentioned lands are charged at all with the payment of said mortgage indebtedness they should be charged only at the rate of three dollars per acre, while the lands still held by Dull should be charged at the rate of four dollars and fifty cents ($4.50) per acre, or in that proportion.

Paragraph 8. Intervenor further states that the defendant herein and Chilio! M. Farrar, John Trefts and A. W. Askwith claim to have some interest in and to said land in plaintiff's petition described, adverse to the title of intervenor, but he alleges that any claim, right or title which said last-named parties have or claim to have in or to the same is junior and inferior to his, and that his title should be qui-ted against all adverse claims.

Wherefore, intervenor prays that all parties to this suit, and all other parties herein named, viz., Daniel Dull, C. M. Farrar, John Trefts, and A. W. Askwith, and W. W. Holcomb be made
11 parties hereto, and may be required to answer this, his petition of intervention, and that all said parties save W. W. Holcomb may be barred and forever estopped from having or claiming any right or title to the premises in plaintiff's petition described, adverse to the title of intervenor, and that as to said Holcomb, he may be required to disclose the amount due upon his mortgage and to foreclose the same, and to enforce the amount due thereon against the lands therein described and yet owned by the said Daniel Dull, before the lands of intervenor shall be charged with any of said mortgaged indebtedness, and for any other, further or different relief which equity and good conscience may require.

E. R. DUFFIE,
Attorney for Intervenor.

STATE OF NEBRASKA, } ss:
Douglas County, }

Edward R. Duffie, being first duly sworn, deposes and says that he is the attorney for the intervenor named in the foregoing petition of intervention; that he has heard said petition read and knows the contents thereof, and the statements therein contained are true, as he verily believes; that he has examined the records and made all inquiries relating to the claims of the various parties to this action, and has as great or greater knowledge of the facts as intervenor himself.

E. R. DUFFIE.

Sworn to before me and subscribed by the said Edward Phelan, this 17th day of September, 1892.

[SEAL.] H. W. PENNOCK,
Notary Public, Douglas County, Nebraska.

12 And on the *22nd day of September, 1892*, the plaintiff, John E. Blackman, files his

Amendment to His Petition

as follows:

Now comes the plaintiff in the above-entitled action, and amends his petition, filed herein, by making W. W. Holcomb, Chiliol M. Farrar, John Trefts, Daniel Dull, and A. W. Askwith additional defendants in the action, and for cause, states:

Paragraph 1. That the said Chiliol M. Farrar, W. W. Holcomb, John Trefts, Daniel Dull, and A. W. Askwith, claim to have some interest in and to the lands described in the petition herein, adverse to the title and interest of plaintiff therein; but the plaintiff alleges the fact to be that any right, title, or interest which said defendants have or claim to have in or to said lands is junior and inferior to the title of the plaintiff herein; and that the plaintiff's title should be quieted against all adverse claims of all of said defendants.

Wherefore plaintiff prays, as in his original petition, and that all of the parties hereto may be barred and forever estopped from having or claiming any right or title to the premises, in plaintiff's petition described, adverse to the title of the plaintiff, and for such other or further relief as may be just and equitable.

E. R. DUFFIE,
Attorney for Plaintiff.

STATE OF IOWA, }
Pottawattamie County, } *ss:*

13 I, E. R. Duffie, being first duly sworn, upon oath depose and say, that I have personal knowledge of the facts above set forth, from conversations held with both parties, and that I verily believe the facts set forth above are true.

E. R. DUFFIE.

Subscribed in my presence and sworn to before me, this 7th day of October, A. D. 1892.

T. S. CAMPBELL,
Clerk District Court.

And on the 13th day of October, 1892, the plaintiff, John E. Blackman, files his

Amended Petition in Equity

as follows:

Paragraph 1. For a cause of action against the defendants, the plaintiff states that on and prior to the 2nd day of August, 1889, he was the owner in fee of the following-described real estate, situated in the county of Pottawattamie, State of Iowa, to wit:

The S. ½ of section 4, the N. E. ¼ of section 9, the N. E. ¼ of the S. E. ¼ of section 9, and about 31.06 acres of the S. E. ¼ of the S. E. ¼ of section 9, more particularly described as follows:

Commencing at the southeast corner of section 9, thence north 80 rods; thence west 32 rods to the centre of Mosquito creek; thence

along the centre of the channel of Mosquito creek to the south line of section 9; thence east 74 rods to the place of beginning; all of said above-described land being in township 76 of range 42.

14 Paragraph 2. That in the month of July, 1889, the plaintiff being in need of funds, made and entered into an agreement with the defendant, George F. Wright, at the city of New York, by the terms of which the defendant Wright was to furnish the plaintiff moneys as they might be needed and called for, not to exceed the sum of $10,000, and as security for the repayment of any and all moneys so advanced by the defendant Wright to the plaintiff, the plaintiff agreed to make, execute and deliver to the defendant Wright a deed to the above-described premises, which deed was to be accepted and recorded by the defendant Wright, upon the execution of a statement in writing, signed by the said Wright, showing the terms and conditions upon which he took title to said land from the plaintiff.

Paragraph 3. It was a further part of said agreement entered into between the parties, that the defendant Wright might sell the lands above described, first obtaining the plaintiff's consent to the terms and conditions of the sale, and that he might execute a deed to the purchaser of any of said lands so sold, and after deducting from the purchase price received therefor the sum or sums of money which he had at that date actually advanced to the plaintiff under said agreement, with interest from the date of such advancement to the date when the purchase-money from the sale of said lands should be received by the defendant Wright, that he should then pay the balance, if any, over to this plaintiff.

Paragraph 4. It was a further condition of said agreement, that the defendant Wright should take possession of all of said land, rent the same on the best terms possible, and after paying the taxes and assessments against the same, account to the plaintiff for any balance of such rents so received by him.

15 Paragraph 5. It was a further condition of said agreement, that if said lands should not be sold by defendant Wright, then and in that case, whenever the plaintiff repaid the defendant Wright the sum or sums of money advanced and received by him, with interest thereon from the date of advancement to the date of payment, that the said Wright would reconvey the said lands to the plaintiff.

Paragraph 6. The plaintiff further states, that on or about the 2nd day of August, 1889, he made a deed to said lands to the defendant Wright, and delivered the same to one Charles Haldane, in the city of New York, and instructed the said Haldane to deliver the same to said Wright, when said Wright signed and returned by mail to this plaintiff a memoranda containing the terms and conditions of the agreement made between the plaintiff and the defendant Wright, relating to such conveyance, and the conditions upon which the said Wright was to hold the title to said land, and to be accepted and recorded by him only upon signing and returning to the plaintiff the memoranda aforesaid.

Paragraph 7. That said deed of conveyance and a memoranda

were by the said Haldane transmitted by mail to the said Wright, at Council Bluffs, Iowa, and the defendant Wright received and recorded the said deed of conveyance, but neglected and refused to sign and deliver to the plaintiff a memoranda or writing showing the conditions upon which he took the conveyance to said land.

Paragraph 8. That notwithstanding said Wright took said deed of conveyance, and caused the same to be recorded, he has, at all times since the date thereof, neglected and refused to advance
16 to the plaintiff any part of the $10,000 agreed to be advanced by him, and for which he took said conveyance as security, and has wholly failed and refused to sign and deliver to the plaintiff any writing showing the terms and conditions upon which he took the conveyance to said premises.

Paragraph 9. That on many occasions prior to the commencement of this action the plaintiff has demanded from the defendant a reconveyance of said premises, but the defendant has at all times neglected and refused to make a reconveyance thereof.

Paragraph 10. That the defendant has no equitable interest in said land, and never did have. That all the right or interest he has therein was by virtue of said agreement above set forth, the terms of which he has never fulfilled on his part, and that the plaintiff is entitled to a reconveyance of said premises without the payment to the said Wright of any sum of money whatever.

Paragraph 11. That the defendant Wright, since the conveyance to him, above mentioned, has had possession of the land aforesaid, and has received the rents and profits thereof, amounting to $3,000 or more, and that he has wholly failed and refused to account to the plaintiff for said rents and profits.

Paragraph 12. Plaintiff further states, that on the — day of February, 1886, one Daniel Dull was the owner of all the lands in plaintiff's petition described, and a large body of other lands, amounting altogether to about 1,400 acres, and that on said date he mortgaged the same to one W. W. Holcomb to secure a loan of $10,700 due in two years from the date of said mortgage, with 6 per cent. interest thereon; that the lands conveyed by said mortgage are the following, to wit:

17 S. W. ¼ of section 10, S. E. ¼ of S. E. ¼ of section 3, S. ½ of S. W. ¼ of section 3, S. W. ¼ of section 4, E. ½ of N. E. ¼ of section 9, N. E. ¼ of S. E. ¼ of section 9, W. ½ of N. E. ¼ of section 10, N. E. ¼ and N. W. ¼ of S. E. ¼ of section 10, N. E. ¼ of N. W. ¼ of section 3, S. E. ¼ of N. E. ¼ of section 3, W. ½ of S. E. ¼ of section 3, S. E. ¼ of S. E. ¼ of section 3, N. ½ of S. W. ¼ of section 3, S. E. ¼ of section —. W. ½ of N. E. ¼ of section 9, S. E. ¼ of S. E. ¼ of section 10, and 31 $\frac{6}{100}$ acres out of the S. E. ¼ of S. E. ¼ of section 9, more particularly described as follows:

Commencing at the southeast corner of section 9, running thence north 80 rods; thence west 32 rods to the center of Mosquito creek; thence along the center of the channel of said creek to the south line of said section 9; thence east 74 rods to the place of beginning; all of said lands being in township 76 of range 42 west of the fifth

principal meridian, and containing altogether 1.386 acres of land as per Government survey.

Paragraph 13. That the said Daniel Dull, as this plaintiff is informed from the records of this county, and charges the fact to be, was, at the commencement of this action, the owner of all the lands in said mortgage described, excepting those described in plaintiff's petition, which he sold and conveyed to the plaintiff in this action, on the 5th day of June, 1889, and excepting also the S. E. ¼ of the S. E. ¼ of section 10, above described, which was sold by said Daniel Dull in 1889, and by Holcomb released from the lien of his mortgage, and plaintiff charges the fact to be that the lands covered by said Holcomb mortgage, and still owned by the said Dull, are of the value of $30,000 or more, and good and ample security for any amount due on said mortgage. That plaintiff does not know
18 and cannot ascertain what amount is now due on the said mortgage indebtedness, said Holcomb refusing to disclose the same to the plaintiff herein; but the said Holcomb refuses to take any steps to foreclose his said mortgage or to collect the amount due thereon from the said Dull, although the same is long past due, and claims to hold the land in plaintiff's petition described with the other lands included in his said mortgage as security for his debt, and by refusing to take steps to enforce the collection thereof, is allowing the same to accumulate and increase, to the prejudice of the plaintiff, if the lands should ultimately become liable for the same or any part thereof.

Paragraph 14. Plaintiff further states that the lands covered by said Holcomb mortgage and still owned by said Dull are and were at the date of the execution of said mortgage of greater value per acre than the lands in plaintiff's petition described; and if said last-mentioned lands are charged at all with the payment of said mortgage indebtedness, they should be charged only at the rate of three dollars per acre, while the lands still held by said Dull should be charged at the rate of $4.50 per acre, or in that proportion.

Paragraph 15. Plaintiff further states that the defendant herein, George F. Wright, and Chilion M. Farrer, John Trefts and A. W. Askwith, and Nettie Dull, claim to have some interest in and to said land in plaintiff's petition described, adverse to the title of plaintiff; but he alleges that any claim, right or title which said last-named parties have or claim to have in or to the same, is junior and inferior to his, and that his title should be quieted against all said adverse claims.

Wherefore, the plaintiff prays that the defendant, George
19 F. Wright, may be required to reconvey to the plaintiff the premises first hereinbefore described, and that in case of his neglect or refusal so to do within a time to be fixed by the court, that then the clerk of this court be appointed a commissioner to make such conveyance, and that an accounting of the rents and profits of said land received by the said Wright, or with which he should stand chargeable, and that the plaintiff have judgment against him therefor.

That the defendant, W. W. Holcomb, be required to disclose the

amount due upon his mortgage, and to foreclose the same, and to enforce the amount due thereon against the lands covered thereby and yet owned by the defendant, Daniel Dull, before the lands of plaintiff shall be charged with any of said mortgage indebtedness, or for any other and further or different relief touching said Holcomb mortgage as to the court shall seem equitable and just, or the plaintiff entitled to receive.

That all the other defendants be required to answer this petition, stating what claim they make to the plaintiff's aforesaid land, and that they be barred and forever estopped from having or claiming any right or title of the plaintiff, and that the plaintiff have any general equitable relief to which he may be entitled under the facts herein set forth or established on the trial.

E. R. DUFFIE,
Attorney for Plaintiff.

STATE OF NEBRASKA, } ss:
Douglas County, }

E. R. Duffie, being first sworn, deposes and says that he is attorney for the plaintiff in the above-entitled action; that he drew the foregoing amended petition, and knows the contents thereof, and that the statements therein are true, as he verily believes.

That he has possession of the plaintiff's paper relating to the land described in the petition, and has made a full examination of the same and of the records of Pottawattamie county, touching the title to said land, and has had several interviews relating thereto with the defendant, George F. Wright, and said Wright's claim thereto, and that from the knowledge thus derived and from interviews and correspondence with the plaintiff he believes he is as fully acquainted with the facts as the plaintiff himself, and he verifies this petition on information obtained, as above set forth, and because the plaintiff is now in the city of New York and a non-resident of the State.

E. R. DUFFIE.

Sworn to before me and subscribed in my presence by the said E. R. Duffie, this 13th day of October, 1892.

[SEAL.] J. T. PATCH,
Notary Public, Douglas County, Nebraska.

And on the 9th day of September, 1892, the defendant, George F. Wright, files his

Answer to the Petition of the Plaintiff

as follows:—

Answering the petition of the plaintiff, filed herein, the defendant states—

That he admits that on or prior to August 2nd, 1889, the plain-

tiff was the owner in fee of the lands described in the peti-
21 tion; and admits that on August 2nd, 1889, the said plaintiff conveyed said lands to the defendant, by deed of general warranty, which deed was accepted by the defendant, and has been recorded in the office of recorder of deeds of Pottawattamie county, Iowa.

The defendant denies that said deed was made, executed and delivered to him by *defendant*, upon any condition whatever, and alleges the truth to be that said deed was made upon a valid consideration, which has been paid, and that the defendant holds good and absolute title to said premises, under said deed of conveyance.

Cross-petition.

Defendant further answering, and by way of cross-petition, states:—

Paragraph 1. That on the 2nd day of August, 1889, the plaintiff herein, being then the owner thereof, conveyed to him, by warranty deed, the following-described premises, to wit:—

The south half of section 4, the N. E. ¼ of section 9, the N. E. ¼ of the S. E. ¼ of section 9, and about 31.06 acres of the S. E. ¼ of the S. E. ¼ of section 9, more particularly described as follows:—

Commencing at the southeast corner of section 9, thence north eighty rods, thence west 32 rods, to the center of Mosquito creek to the south line of section 9, thence east 74 rods to the place of beginning, all of said described land being in township 76, of range 42, Pottawattamie county, Iowa.

Paragraph 2. That prior to said conveyance, one Daniel
22 Dull was the owner in fee of the said above-described premises, and was the grantor of the said John E. Blackman, from whom defendant derived his title. That when said Daniel Dull was the owner thereof he executed a mortgage on said premises, together with a large tract of other lands, to one W. W. Holcomb, which said mortgage was made to secure the payment of about $10,000, due from the said Daniel Dull to said Holcomb; that the said Dull conveyed the lands, as above described, to the said plaintiff, John E. Blackman, by deed of general warranty, and while said Holcomb's mortgage was a lien thereon, said Holcomb mortgaged in addition to the lands above described about 1,000 acres, which additional lands are more than ample security for the payment of said mortgage. That the said Dull is still the owner of said additional lands, and that he should be charged with the payment of said mortgage in full; and that the lands, as above described, be released from the lien thereon.

Wherefore, the defendant asks a decree and an order making W. W. Holcomb a party defendant to this defendant's said cross-bill, and that the said W. W. Holcomb be required to first exhaust the property covered by his said mortgage, being the property described in this defendant's said cross-bill; and that the defendant's title, as above described, be quieted and confirmed, as to the plaintiff herein, and the said defendant, W. W. Holcomb, and that said

plaintiff be forever barred and estopped from having or claiming any right or title to said premises adverse to this defendant, and that the defendant have such other and further equitable relief as the court may deem just and equitable.

JOHN N. BALDWIN,
Attorney for Defendant.

23 STATE OF IOWA, } ss:
Pottawattamie County, }

I, George F. Wright, being first duly sworn, upon oath say that I am one of the defendants named in the above-entitled action; that I am acquainted with the contents of the foregoing answer, and that the same is true, as I verily believe.

GEO. F. WRIGHT.

Subscribed in my presence and sworn to before me, by the said George F. Wright, this 8th day of September, A. D. 1892.

[SEAL.] A. W. ASKWITH,
Notary Public.

And on the 21st day of June, 1893, the defendant, George F. Wright, files an

Amendment to His Answer

as follows:

Comes now, George F. Wright, defendant, and by way of amendment to his answer to petition, heretofore filed herein, and answering petition and all amendments thereto, states:

1st. That he denies all allegations in said amendments thereto contained, not heretofore controverted.

JOHN N. BALDWIN,
Attorney for Defendant George F. Wright.

And on the 2nd day of February, 1893, the defendants, Daniel Dull and wife, file their

Answer,

denying each and every allegation in plaintiff's petition, and
24 in the petition of intervention, and the amendments thereto contained.

On the 15th day of February, 1893, the defendants, Daniel Dull and wife, filed their separate

Amended Answer and Cross-petition

as follows:

Come now the defendants, Daniel Dull, and Nellie M. Dull, and in obedience to the order of the court herein, and for answer to the petition of the plaintiff, and of the intervenor, Edward Phelan, state:

1st. That as to the matters and facts stated in said petitions, save as

herein otherwise answered, they deny each and every allegation therein contained.

2nd. Further answering, by way of plea in abatement and bar to this action, and the action of the intervenor herein, these defendants state that an action is now pending in the State of New York, in and for Westchester county, in which this defendant, Daniel Dull, is plaintiff, and the plaintiff herein, John E. Blackman, together with George F. Wright, A. W. Askwith, defendants herein, and Edward Phelan, intervenor herein, are defendants; in which the same issues are made and the same relief sought as in the case at bar.

That said court is a court of general jurisdiction, and having full jurisdiction of the parties and subject-matter in controversy.

Subject to the foregoing plea in abatement, and bar to intervenor's action, and by way of

25 *Cross-petition and Cross-demand*

against the plaintiff, and the intervenor, Phelan, and their codefendants herein, these defendants state:

1st. That on the 25th day of June, 1869, Daniel Dull was the owner in fee-simple of the following-described land in Pottawattamie county, Iowa, to wit:

The south half of section four (4); the northeast quarter of section nine (9); the northeast quarter of the southeast quarter of section nine (9); and $31\frac{6}{10}$ acres out of the southeast quarter of the south east quarter of section nine (9), being the same part of the said last-mentioned forty-acre tract, heretofore conveyed to Daniel Dull by George F. Wright, all in township seventy-six (76), north of range forty-two (42), west of the fifth P. M., containing in all $551\frac{6}{10}$ acres.

2nd. That a short time prior to said 25th day of June, 1889, the plaintiff, John E. Blackman, intending to cheat and defraud this defendant, represented to him that a certain parcel of land on the southwest corner of Broadway and Fifty-first street, in the city of New York, which defendant had leased from one A. M. Lyon for a term of years, and upon which defendant had erected a substantial building, and which defendant then occupied, did not belong to said Lyon, but belonged to said Blackman, and that he was about to begin a suit against said Lyon and this defendant to eject him therefrom.

Said Blackman at the same time represented that the title to said land, until recently, had been vested in the heirs of one John Hopper (some two hundred in number), and that he had obtained
26 and held conveyances from said heirs, representing about 85 per cent. of the title, and that he had made complete arrangements by which he would shortly obtain conveyances from the remaining heirs.

3rd. This defendant, relying upon the truth of said statements, and representations so made by the plaintiff Blackman, and believing said statements and representations to be true, entered into a contract whereby he agreed to convey to said Blackman the Iowa

lands hereinbefore described, and said Blackman agreed to promptly prosecute his suit to recover said land at Broadway and Fifty-first street, New York city, at his own expense, and to a final determination; and in the event that he succeeded, he would give to defendant a conveyance thereof, and put him in possession thereunder; and before entering into said contract said Blackman expressly represented that he was the possessor of ample funds and property wherewith to prosecute said action.

4th. That the defendant, relying upon each of said representations, and being solely moved and induced thereby, on the 25th day of June, 1889, executed and delivered to the plaintiff Blackman a good and sufficient deed, with covenants of warrant, conveying to him the lands described in paragraph 1 hereof, and said Blackman, on the 30th day of August, 1889, caused the same to be recorded in Book 208, page 311, of the records of Pottawattamie county, Iowa.

5th. Defendants further allege that each and all of the representations so made by said Blackman were false and untrue, and were known so to be by him at the time of making the same. That in truth and in fact said Blackman had not at that time about 85 per cent. of the title of said Hopper heirs, nor as defendant is
27 informed and believes, more than 55 per cent. thereof; and he had not in fact any prospect or belief that he would ever acquire the whole or any part of said title, and in truth and in fact, of the portion of said title which he had acquired more than 25 per cent. had been conveyed or pledged by him to other persons, so that it was beyond his control; and that in truth and in fact said Blackman had not at the time of making said representations any funds or property wherewith to employ counsel or prosecute his claim to the property, and has never since that time been possessed of any such funds or property; and that said statements and representations were made by the plaintiff Blackman for the sole purpose of deceiving, cheating and defrauding this defendant.

6th. That immediately on discovering the fraud of the plaintiff Blackman, this defendant demanded of him a reconveyance of the property, and a rescission of the transaction, and that the said Blackman thereupon promised to reconvey said Iowa land to this defendant, but has wholly neglected and refused since the making of said promises so to do, and instead thereof began this action for the purpose of putting defendant to great expense and trouble, and compelling him to pay a sum of money for such reconveyance.

7th. Defendant further states that on the 2nd day of August, 1889, the plaintiff Blackman executed a quitclaim deed of the lands hereinbefore described, to George F. Wright, defendant herein which deed was wholly without consideration, and that said Wright, on the 16th day of November, 1891, without any right or authority from this defendant, executed a mortgage on said land to one A. W. Askwith, purporting to secure the payment of a sum of five thou-
sand dollars, which said mortgage defendant alleges, upon
28 information and belief, was executed without any consideration whatsoever, and with full knowledge of all the matters and facts hereinbefore alleged.

8th. That on the 30th day of January, 1892, the plaintiff Blackman executed another and additional conveyance of said land to the intervenor herein, Edward Phelan, but such conveyance, as defendant is informed and believes, was made without consideration, and with full knowledge of defendant's claim to the property, and of the fraud which had been perpetrated on him by Blackman.

9th. That on the 27th day of August, 1892, the intervenor, Phelan, executed and delivered to one Edward R. Duffie a mortgage upon said lands to secure to the said Duffie, who is an attorney-at-law herein, certain fees which the plaintiff Blackman had agreed to pay to the said Duffie for defending said Blackman against defendant's claim to said land, said Duffie at the time of making said contract well knowing the facts hereinbefore stated, and that the said Blackman had obtained a deed from this defendant by fraud and misrepresentation.

10th. That said Iowa lands are worth the sum of fifteen thousand dollars, and that the plaintiff Blackman has obtained possession of the same, and has, either personally or through the defendant George F. Wright collected the rents thereof, aggregating, as defendant is informed and believes, the sum of three thousand dollars. That the plaintiff Blackman is not only insolvent but has no visible or available property either real or personal.

11th. That this *plaintiff*, and each of his codefendants, and the grantees and mortgagees of said Iowa property, and each
29 one of them, at the time of acquiring a pretended interest therein well knew that the title to said real estate had been obtained from this defendant wholly without consideration, and through the fraud and deceit and misrepresentation of the plaintiff Blackman.

12th. That Nellie M. Dull, the wife of Daniel Dull, is now the owner of the property described in paragraph 1, of this cross-petition, under and by virtue of a warranty deed from her codefendant herein, Daniel Dull.

13th. That the Council Bluffs Savings Bank of Council Bluffs, Iowa, as defendant is informed and believes, claims some interest by purchase, or otherwise, of the five-thousand-dollar mortgage mentioned in paragraph 7, herein.

Wherefore, by reason of the premises, these defendants ask that the Council Bluffs savings bank and Edward R. Duffie be made additional parties to this action, and defendants to their cross-petition herein, and that the plaintiff, John E. Blackman, and their codefendants, George F. Wright, A. W. Askwith, and the intervenor Edward Phelan, and the Council Bluffs savings bank, and Edward R. Duffie, be required to answer this cross-petition within such time as the court shall determine, and that on final hearing a decree of this court be made cancelling and annulling the deed from these defendants to the plaintiff herein, and declaring same to be utterly null and void; and that the deed from plaintiff Blackman to the defendant George F. Wright be cancelled and held for naught, and that the deed from the plaintiff to the intervenor Phelan, herein, be cancelled and held for naught; and that the mortgage executed by

defendant George F. Wright to his codefendant, A. W. Askwith, be cancelled and held for naught. And that it be further decreed and determined that neither of the defendants or the plaintiff herein has any lien interest or right to the property in controversy, and that the title of these defendants be quieted in and to all of said property as against the adverse claims of the plaintiff and all of said codefendants; and that an accounting of the rents and profits thereof be had, and that judgment be rendered in favor of these defendants in the sum of $3,000, with interest therefor.

And these defendants pray for such other and further relief as to the court may seem equitable in the premises.

FLICKINGER BROS.,
Attorneys for Defendants Daniel Dull and Nellie M. Dull.

And on the 29th day of May, 1893, the defendants, Daniel Dull and wife, file an

Amendment to Their Separate Answer and Cross-petition

as follows:—

Come now the defendants Daniel Dull and wife, and for an amendment to their answer and cross-petition, heretofore filed, and particularly the second paragraph of said answer, state:—

That since the filing of said answer and cross-petition the action mentioned in said paragraph 2nd, as pending in the supreme court of Westchester county, New York, has gone to a decree and final decision, as shown by "Exhibit A," a true copy of said decree and adjudication — hereto attached and made a part hereof.

That said decree is a complete adjudication of the rights of the parties in this controversy, and is a bar to the further prosecution of this action.

Wherefore defendants, Daniel Dull and wife, ask judgment as in their original answer and cross-petition prayed.

FLICKINGER BROS.,
Attorneys for Daniel Dull and Wife, Defendants.

"EXHIBIT A."

The People of the State of New York, by the grace of God, free and independent, to all to whom these presents shall come or may concern, Greeting:

Know ye, that we having examined the records and files in the office of the clerk of the county of Westchester, and clerk of the supreme court of said State for said county, do find a certain judgment and decree there remaining, in the words and figures following, to wit:

Folio 1. At a special term of the supreme court, Westchester county, held at the court-house, in the village of White Plains, this 20th day of May, 1893:

Present: Hon. Jackson O. Dykman, justice.

DANIEL DULL, Plaintiff,
against
JOHN E. BLACKMAN, MARY E. BLACKMAN, GEORGE F. Wright, Asa W. Askwith (Asa Being Fictitious, Christian Name Unknown), Edward Phelan, Edward R. Duffie, Defendants.
} Decree.

2. This action coming on to be heard at a special term of
32 this court, at the court-house, in the village of White Plains, before Hon. Jackson O. Dykman, on the 3rd day of April, and the 6th and 16th days of May, 1893, and the court having made and filed its findings of fact and the conclusions of law, and the decision in favor of the plaintiff and against the defendants, which entitled the plaintiff to this judgment and decree, whereby the court found, among other things, that the plaintiff, on the 25th day of June, 1889, was the owner in fee-simple of certain lands in Pottawattamie county, Iowa, hereinafter described, which said lands plaintiff deeded to the defendant John E. Blackman, relying upon certain statements and representations made by said Blackman to plaintiff, which said statements and representations were false, and known by the defendant Blackman to be false and untrue, and which were made with intent to deceive plaintiff; and that plaintiff, relying upon the truth of said statements and representations, made said deed of said land in Pottawattamie county, Iowa, to said defendant Blackman, believing said statements and representations to be true.

4. The court having further found that after receiving said deed, said defendant Blackman commenced an action in the district court of Pottawattamie county, Iowa, against this plaintiff, Daniel Dull, and Nellie M. Dull, his wife, claiming to be the absolute owner of said lands, and asking that the said plaintiff and his wife be declared to have no claim or interest therein, and that all the defendants in this action were also parties to said action in the Iowa court, and became interested in said litigation by virtue of certain conveyances made by said Blackman and his grantees; and the court having granted a preliminary injunction on the 9th day of November, 1892, enjoining and restraining the defendant John E. Blackman from conveying or encumbering said lands or any part thereof,
33 and from further prosecuting against said Daniel Dull and Nellie M. Dull said suit in the district court of Pottawattamie county, Iowa, or permitting the same to be prosecuted, and from commencing or prosecuting any other person affecting the title of said Daniel Dull and Nellie M. Dull to said lands, which said injunction was served upon the defendant Blackman personally on the 15th day of November, 1892, in the city and county of New York, which said preliminary injunction has never been vacated or set aside:

Now, on motion of Martin J. Keogh, attorney for plaintiff, Daniel Dull, it is

Adjudged and decreed, that the deed of the lands hereinafter described, situated in Pottawattamie county, Iowa, made by the plain-

tiff Daniel Dull to the defendant John E. Blackman, which said deed bears date the 25th day of June, 1889, be and the same is declared and adjudged to be void and of no force or effect whatsoever, and said defendant John E. Blackman be and he hereby is ordered and directed to execute to the plaintiff Daniel Dull, a good and sufficient deed, conveying to the plaintiff said lands hereinafter described, which deed shall recite the findings and decision of this court.

It is further ordered, adjudged and decreed, that the defendant John E. Blackman be and he hereby is, and the defendants, Mary E. Blackman, George F. Wright, Asa W. Askwith (Asa being fictitious, Christian name unknown), Edward Phelan, Edward R. Duffie, be and each of them hereby is perpetually enjoined and forever restrained from prosecuting a certain action in the district court of Pottawattamie county, Iowa, affecting the title to said lands against this plaintiff, Daniel Dull, and his wife, Nellie M. Dull, or
34 either of them, and from executing any further or other conveyances of said lands, or from encumbering the same in any way.

The lands hereby directed to be so conveyed by said defendant John E. Blackman to the plaintiff Daniel Dull, are situated in Pottawattamie county, Iowa, and particularly described as follows, to wit:

The south half (S. $\frac{1}{2}$) of section numbered four (4), the northeast quarter (N. E. $\frac{1}{4}$) of section numbered nine (9), the northeast quarter of the southeast quarter (N. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$) of section numbered nine (9), and $\frac{31}{100}$ acres out of the southeast quarter of the southeast quarter (S. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$) of section numbered nine (9), (being the same part of said last-mentioned forty-acre tract heretofore conveyed to Daniel Dull by George F. Wright), all in township seventy-six (76), north of range forty-two (42) west of the 5th P. M., in all 551.06 acres.

It is further adjudged and decreed, that the plaintiff recover his costs and disbursements in this action, as taxed at $—, and have execution therefor.

J. C. DYKMAN,
Judge Supreme Court.

All of which we have caused by these presents to be exemplified, and the seal of our supreme court to be hereunto affixed.

Witness, Hon. J. F. Barnard, justice, at White Plains, the 24th day of May, in the year of our Lord one thousand eight hundred and ninety-three.

(Signed) JOHN H. DIGNEY, *Clerk.*

35 I, J. F. Barnard, presiding justice of the supreme court of New York, for the county of Westchester, do hereby certify that John H. Digney, whose name is subscribed to the preceding exemplification, is the clerk of said county of Westchester and clerk of the supreme court, for said county, duly elected and sworn, and that full faith and credit are due to his official acts. I further

certify that the seal affixed to the exemplification is the seal of our said supreme court, and that the attestation thereof is in due form.

Dated, White Plains, May 24th, 1893.

J. F. BARNARD, *Judge.*

STATE OF NEW YORK, } ss:
County of Westchester, }

—, John H. Digney, clerk of the supreme court of said State, in and for the county of Westchester, do hereby certify that J. F. Barnard, whose name is subscribed to the preceding certificate, is presiding justice of the supreme court of said State, in and for the county of Westchester, duly elected and sworn, and that the signature of said justice to said certificate is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court this 24th day of May, 1895.

JOHN H. DIGNEY, *Clerk.*

And on the 11th day of July, 1893, the defendants, Daniel Dull and wife, file a

Second Amendment to Their Cross-petition

as follows:

36 Comes now Daniel Dull, and for an amendment to his cross-petition filed herein, and as paragraph 5½ thereof, and to be inserted therein as paragraph 5½, states:

5½. That at the time of the conveyance of the land in controversy the plaintiff Blackman, with the intent to defraud these defendants, had no intention of conveying to him the premises agreed to be conveyed, but subsequently conveyed the same to one A. M. Lyon, his landlord, and received as consideration for said conveyance the sum of ten thousand dollars, and this defendant has received no conveyance nor consideration of any kind whatsoever for said property so conveyed to said Blackman.

That said Blackman made said conveyance to said Lyon in fraud of the rights of this defendant and for the sole purpose of cheating and defrauding him in the premises, and as part of a conspiracy between him and his partner Haldane, who was a member of the firm of Wright, Baldwin & Haldane, of which firm the defendant, George F. Wright, was at the time a member.

That by reason of the fraudulent intent, purpose and acts of the said Blackman this defendant received no consideration whatever for the conveyance of said property to Blackman, and was defrauded thereby.

10½. For further amendment, and as paragraph 10½ to his cross-petition, this defendant states that the acts of the plaintiff Blackman, and of the defendants Wright, Phelan and Duffie, are collusive and the result of a conspiracy and collusion among themselves to defraud the defendants Daniel Dull and wife out of their interest in the property in controversy, and that their alleged inter-

37 ests in the property, as shown by the pleadings, against each other are wholly fictitious, and have no actual existence in

fact, but that they have between themselves parceled out and divided up the land in controversy, and are jointly interested in the result of this litigation, and have no adverse interests to each other, but have conspired, banded and confederated together as against this defendant, for the purpose of defrauding and depriving him of the property in controversy.

Wherefore he asks judgment as in his original cross-petition prayed.

FLICKINGER BROS.,
Attorneys for Daniel Dull and Wife.

And on the 24th day of June, 1893, the defendant George F. Wright files his

Answer to the Cross-petition of Daniel Dull and Wife

as follows:

Comes now the defendant, George F. Wright, and for separate answer to the cross-petition of Daniel Dull and wife, and amendments thereto, states:

1. That he denies each and every allegation therein contained, except such as are hereinafter admitted or in some other manner controverted.

2. Defendant admits the statements in paragraph 1 of said cross-petition.

3. As to the statements contained in paragraphs 1, 3, 4, 5
38 and 6 of said cross-petition, this defendant has neither information or knowledge sufficient to warrant him in either admitting or denying the same.

4. This defendant admits that said Blackman conveyed the property described to this defendant, and defendant also admits that he executed and delivered a mortgage on the same to A. W. Askwith for $5,000.

5. As to the allegations contained in paragraphs 8 and 9 of said cross-petition, this defendant has neither knowledge nor information sufficient to warrant him in either admitting or denying the same.

JOHN N. BALDWIN,
Attorney for George F. Wright.

(Verified.)

And on the 23d day of June, 1893, the intervenor, E. R. Phelan, files his

Amendment to His Petition of Intervention

as follows:

Comes now Edward R. Phelan, substituted plaintiff and intervenor in the case above entitled, and by leave of court first had and obtained, files this his amendment to his petition of intervention:

The intervenor further states that at the time of the purchase of the lands in controversy in this action of the plaintiff Blackman he also purchased of him his claim against the defendant Wright for

the rents and profits of said land while same was in the possession of said Wright, and he alleges that the rents and profits
39 thereof were of the value of three dollars per acre per annum, amounting in the aggregate to the sum of $4,800.00.

Wherefore he demands judgment against the said Wright for the sum of $4,800 as rents and profits of said land in addition to the relief asked in the prayer of his original petition.

E. E. DUFFIE AND
CHARLES GREEN,
Attorneys for Intervenor.

(Verified.)

And on the 24th day of June, 1893, the defendant George F. Wright files a

Separate Answer to the Petition of Intervention of Edward R. Phelan

as follows:

Comes now George F. Wright, one of the defendants in the above-entitled action, and for answer to the amendment to the petition of intervention of Edward R. Phelan, filed herein, states:

That he denies each and every allegation in said amendment to the petition of intervention of Edward R. Phelan contained.

JOHN N. BALDWIN,
Attorney for Defendant George F. Wright.

And on the 5th day of June, 1893, Intervenor Ed. Phelan files his

Answer to the Amendment to the Cross-petition of Daniel Dull and Wife

as follows:

40 Comes now Ed. Phelan, substituted as *pial*ntiff herein, and also intervenor, and for answer to the amendment to the cross-bill of Daniel Dull and Nellie Dull, filed herein, says:

That he admits that since the filing of the original answer and cross-petition by said defendants the action mentioned in paragraph 2nd of said original answer and cross-petition as pending in the supreme court of Westchester county, New York, has gone to decree, and final determination, but whether "Ex. A" attached to the amended answer and cross-bill is a true copy of the decree entered in said cause, this answering party has no knowledge or information sufficient to form a belief, and he therefore denies the same.

2nd. Further answering, he states that the said action in the supreme court of Westchester county, New York, was an action brought by the defendant Daniel Dull as plaintiff against John E. Blackman, Mary E. Blackman, George F. Wright, Asa W. Askwith, Edward Phelan and Edward R. Duffie, who were made defendants therein; the object of said action being to procure the judgment and decree of said court adjudging the deed made by the said Daniel Dull and Nellie Dull, his wife, to the said John E. Black-

man, conveying the lands in controversy in this action, and dated June 25th, 1889, to have been obtained by fraud, and false representations, and therefore void, and ordering the said Blackman to make a reconveyance of said land and to enjoin the said Blackman from executing any further conveyances of said land and from further prosecuting this suit to quiet his title thereto, and for general equitable relief.

3rd. He further states that for a long time prior to the commencement of said action, he and his codefendant Duffie, were
41 residents of Omaha, in the State of Nebraska, and that neither he nor the said Duffie were residents of the State of New York when the said action was commenced, nor at any time subsequent thereto, nor had they an place of residence in said State. That neither he nor the said Duffie had been in the State of New York for a long time prior to the commencement of said action up to the present time, and at no time since said action was commenced and long prior thereto, had they been within the jurisdiction of the said supreme court of Westchester county, New York. That neither the said Phelan nor the said Duffie appeared in said action, nor did they authorize any one to appear for them, and that no notice or process of any kind was served upon them of the pendency of said action, except a paper entitled a summons, signed by Martin J. Keogh as plaintiff's attorney, which said paper or summons was served upon the said Phelan and said Duffie by delivering to them a copy thereof, together with a copy of the petition in said action, in the city of Omaha, in the State of Nebraska, on or about the 24th day of December, 1892, for which reasons the said Phelan alleges that the said judgment and decree of said supreme court of Westchester county, New York, entered in said cause is as to the said Phelan and to the said Duffie wholly void, and of no force or effect, the court pronouncing the same having no jurisdiction of the subject-matter of the action, or of the persons of the said Phelan or the said Duffie.

Wherefore he prays judgment as in the petition and petition of intervention.

E. R. DUFFIE,
Plaintiff's Attorney.

(Verified.)

On the 5th day of June, 1893, E. R. Phelan, intervenor, files his

42 *Amendment to his Answer to the Cross-bill of Daniel Dull and Wife*

as follows:

Comes now Ed. Phelan, substituted plaintiff and intervenor herein, and by leave of the court first had and obtained, amends his answer to the cross-bill of Daniel Dull and wife by inserting therein between the eleventh and twelfth paragraph thereof the following, to wit:

11 A. Further answering said cross-bill the intervenor states, *that while he held the title of said land as security only for the amoun*t

due himself and said Duffie and Savage he executed a mortgage thereon to the said Duffie for the amount due and owing him from Blackman, viz: the sum of five thousand five hundred dollars ($5,500.00), and that thereafter and on and about the fifteenth day of September, 1892, and at or about the time this intervenor purchased said land from Blackman, said Blackman ratified and confirmed the act of this intervenor in executing and delivering said mortgage to said Duffie in consideration of a receipt in full, from said Duffie for attorney's fees due him from Blackman at that date, and the further consideration of Duffie releasing said Blackman from an agreement made between Duffie and Blackman, made in 1888, by which Duffie was to have an interest in whatever might be realized from the prosecution of the claim of the heirs of one John Hopper to certain property in the city of New York, and in the State of New Jersey, in and about the prosecution of which the said Duffie had expended a large amount of money and spent several months of time, which receipt and release the said Duffie then and there agreed to make to said Blackman, and did execute and deliver to him.

43 11 B. Further answering, the intervenor states that at and prior to the time of the conveyance of the land in controversy to him as security, the original plaintiff herein, John E. Blackman, was indebted to one E. P. Savage of South Omaha, Nebraska, in the sum of one thousand dollars ($1,000.00), more or less, for which said Savage held certain notes and obligations belonging to said Blackman, as collateral security. That thereafter, and at or about the date of the purchase of said land by the intervenor, in consideration of the agreement of this intervenor to pay to said Savage the amount so due him when the title to said land was settled and confirmed in this intervenor, and the further consideration that said Blackman should provide for the payment of the debt then due said Savage, which debt was wholly due at that time said Savage agreed to forbear the collection thereof until the determination of this suit, and to refrain from any steps toward applying the collateral securities by him held to the satisfaction of said indebtedness, and that in pursuance of his said agreement the said Savage has delayed and postponed the collection of his said debt from thence to the present time, and has refrained from any attempt to inforce the collection thereof out of the collateral security by him held to secure the same.

E. R. DUFFIE,
Attorney for Intervenor.

And on the 5th day of July, 1893, the intervenor, E. R. Phelan, files his

Amendment to His Answer to the Cross-bill of Daniel Dull and Wife

as follows:

For amendment to his answer to the amendment to the
44 answer and cross-bill of Daniel Dull and wife, this answering party says:

That in the month of February, 1892, and prior to any convey-

ance of the land in controversy by the said Daniel Dull to Nellie Dull, his wife, E. R. Duffie, one of the defendants in said cross-bill, met the said Daniel Dull and the said John E. Blackman in the city of Chicago, where the parties had met by mutual agreement to arrange and settle their differences concerning the controversy between them relating to the land in suit. That the said Duffie remained with the parties for two days or more and assisted in compromising and settling the difficulty between them. That before leaving the said city of Chicago for his home in Omaha, both the said Dull and the said Blackman informed the said Duffie that their differences had been arranged and settled by agreement made between them by which the said Dull abandoned any claim to the land in controversy herein, and was to advance to the said Blackman certain sums of money in consideration of which Blackman was to convey to the said Dull, a certain share or interest in the claim of the Hopper heirs to certain property in the city of New York, and in the State of New Jersey, the legal title to most of which property was held by the said Blackman, and that relying on said settlement and the statements of Dull and Blackman, relating thereto, said Duffie took his mortgage upon the land in controversy herein, and released to the said Blackman his claim and lien against the New York and New Jersey property aforesaid.

That upon his return home the said Duffie informed this answering defendant of the settlement between the parties, as above set forth, and that relying on the same, this defendant purchased
45 the land in controversy from the said Blackman, and assumed the payment of the said mortgage executed to the said Duffie, and also assumed the payment of the claim of one E. P. Savage of South Omaha, Nebraska, against the land.

Wherefore this defendant says that the said Dull is, and of right ought to be, estopped from claiming or having any interest in the land in controversy, as against the rights and interests of this defendant.

Defendant therefore prays judgment as in his original answer.

E. R. DUFFIE,
Attorney for Plaintiff.

(Verified by Duffie.)

And on the 8th day of July, 1893, the intervenor, E. R. Phelan, files his

Amendment to His Answer to the Cross-petition of Daniel Dull and Wife

as follows:

Comes now Ed. Phelan, and by way of amendment to his answer to the cross-petition of Daniel Dull and wife, states:

That Daniel Dull, in August, 1889, at the time of the execution and delivery of the deed of Blackman to Wright, had actual knowledge of the fact that the land in controversy herein was conveyed to George F. Wright for advances made and to be made, to the extent of $10,000, to one C. Haldane and said Blackman, to be used in

carrying on the enterprise known as "the New York enterprise," and that at said time said Daniel Dull and wife had conveyed to said Blackman the land in controversy, in consideration of
46 the said Blackman mortgaging to Daniel Dull certain property in New York city, of which the said Blackman at the time was the owner, for the sum of $10,000, and that at said time the agreed value of the property in New York city was the same as the value of the property in controversy herein, and that at the same time the said Blackman and wife made and executed a deed to said property in New York to Daniel Dull, to be held in escrow until the consummation of certain matters with reference to the title of the New York City property, and that said mortgage was given as additional security and as a guaranty of good faith upon the part of said Haldane and Blackman in the transaction with Dull. That said Daniel Dull had the privilege of filing said mortgage for record at any time, and that at that time and long prior to October 1, 1889, said Dull had knowledge of the fact that said Blackman was financially irresponsible and insolvent. That after having knowledge of all of the facts hereinbefore set forth, the said Daniel Dull negligently failed to file the said mortgage for record, and that afterwards the said Blackman quitclaimed the New York property covered by said mortgage, to one Lyon, the tenant of Daniel Dull, then occupying the said New York City property, together with other property, and the said Lyon placed his said deed of conveyance on record, and that said Lyon, at the time of the taking of the deed from said Blackman of the said property in New York city, had no knowledge or notice of the fact that Daniel Dull had a mortgage upon the same and identical property, and that had said Daniel Dull placed the said mortgage on record on the said New York City property, prior to the execution and delivery of the deed by Blackman to him (Lyon) of said land, the said Lyon would not have bought the said New York City property, and without record, the mortgage and
47 interest of the said Daniel Dull obtained through said mortgage would have been paramount and superior to the lien or interest of the said Lyon, and that by reason of all these facts the said Daniel Dull has waived any right to claim any interest or title in the property in controversy as against this intervenor, and by reason of his acts, as hereinbefore set forth, and by reason of his knowledge of the matters and things herein alleged at and prior to any damage suffered by him, he is now estopped and in equity and good conscience should be estopped from setting up any claim or interest in the property in question adverse to this —.

E. R. DUFFIE,
Attorney for Ed. Phelan.

(Verified by Duffie.)

And on the 8th day of July, 1893, the defendant, E. R. Duffie, files his

Amendment to His Answer to the Cross-petition of Daniel Dull and Wife

as follows:

Comes now E. R. Duffie, and by way of amendment to his answer to the cross-petition of Daniel Dull and wife, states:

That Daniel Dull, in August, 1889, at the time of the execution and delivery of the deed of Blackman to Wright, had actual knowledge of the fact that the land in controversy herein was conveyed to George F. Wright for advances made and to be made to the extent of $10,000, to one C. Haldane and said Blackman, to be used in carrying on the enterprise known as "the New York enterprise," and that at said time said Daniel Dull and wife had
48 conveyed to said Blackman the land in controversy, in consideration of the said Blackman mortgaging to Daniel Dull certain property in New York city, of which the said Blackman at the time was the owner, for the sum of $10.000, and that at said time the agreed value of the property in New York city was the same as the value of the property in controversy herein, and that at the same time the said Blackman and wife made and executed a deed to said property in New York city to Daniel Dull, to be held in escrow until the consummation of certain matters with reference to the title of the New York city property, and that said mortgage was given as additional security and as a guaranty of good faith upon the part of said Haldane and Blackman in the transaction with the said Dull. That said Daniel Dull had the privilege of filing said mortgage for record at any time, and that at that time and long prior to October 1, 1889, said Dull had knowledge of the fact that said Blackman was financially irresponsible and insolvent. That after having knowledge of all of the facts hereinbefore set forth, the said Daniel Dull negligently failed to file the said mortgage for record, and that afterwards the said Blackman quitclaimed the New York property covered by said mortgage to one Lyon, the tenant of Daniel Dull, then occupying the said New York City property, together with other property, and the said Lyon placed his said deed of conveyance on record; and that said Lyon, at the time of the taking of the deed from said Blackman of the said property in New York city, had no knowledge or notice of the fact that Daniel Dull had a mortgage upon the same and identical property, and that had said Daniel Dull placed the said mortgage on record on the said New York City property, prior to the execution and delivery of the deed by Blackman to him (Lyon) of said land, the said Lyon would not have bought the said New York
49 City property, and without record, the mortgage and interest of the said Daniel Dull, obtained through said mortgage would have been paramount and superior to the lien or interest of the said Lyon, and that by reason of all these facts, the said Daniel Dull has waived any right to claim any interest or title in the property in controversy as against this defendant in his cross-bill, and by reason of his acts as hereinbefore set forth, and by reason of his knowledge of the matters and things herein alleged,

at and prior to any damage suffered by him, he is now estopped, and in equity and good conscience should be estopped from setting up any claim or interest in the property in question adverse to this defendant.

E. R. DUFFIE, *Pro Se.*

STATE OF IOWA, } ss:
Pottawattamie County, }

I, E. R. Duffie, being first duly sworn, on oath say that I am one of the defendants in the above-entitled action; that I have read the foregoing amendment, and the statements therein contained are true, as I verily believe.

E. R. DUFFIE.

Subscribed in my presence and sworn to before me, this 8th day of July, 1893.

[SEAL.] A. W. ASKWITH,
Notary Public.

And on the issues so joined the following is all the evidence offered, and all the evidence introduced, and all the evidence offered to be introduced, on the trial of this action, together with the objections and exceptions of the parties thereto, and the rulings of the court thereon.

50 *Evidence of Ed. Phelan, Intervenor.*

1st. Deed of Daniel Dull and wife, dated June 28, 1889, conveying the land described in plaintiff's petition to John E. Blackman, and duly recorded on the 20th day of August, 1889.

2nd. Power of attorney Mary E. Blackman to E. R. Duffie to convey lands in Iowa, dated January 2, 1892, and recorded March 30, 1892.

3rd. Deed of John E. Blackman and wife, Mary E., to Edward Phelan, conveying the land in controversy, and dated January 30, 1892, Mary E. Blackman, signing by R. E. Duffie, attorney-in-fact.

4th. Mortgage of Ed. Phelan and wife to E. R. Duffie, on the land in controversy, dated August 27, 1892, and recorded August 30, 1892, and containing the following provisions:

"*Whereas said John E. Blackman is indebted to E. R. Duffie,* in the sum of $5,500, due September 1, 1892, with 8 per cent. interest from January 30, 1892, and conveyed the legal title to the above-described land to the said Edward Phelan, to secure said sum to the said Duffie, and also moneys advanced by said Phelan to said John E. Blackman.

Now, if the said John E. Blackman shall well and truly pay or cause to be paid the sum of money to the said Duffie, with interest at 8 per cent. from January 30, 1892, and shall duly keep and perform all the other covenants and agreements herein contained on his part to be kept, and performed, then these presents shall be null and void." (Here follows the usual clause that in case said sum of money is not paid by Blackman foreclosure shall be had.)

51 5th. Deed made by John E. Blackman and Mary, his wife, dated August 2, 1889, conveying the property in controversy to George F. Wright, and "warranting and defending the title to said premises against the lawful claims of all persons claiming by through or under us."

(To all of the foregoing instruments the defendants Dull and wife objected as incompetent, irrelevant, immaterial.)

JOHN E. BLACKMAN.

I did not deliver the deed above set out personally to Mr. Wright. I gave it to Mr. Haldane, with instructions for him to prepare memorandum, together with the deed, to Mr. Wright, or to deliver the deed when he received the memorandum back. The memorandum was to provide that I should deed Wright this land, and he was to advance money as needed, up to the amount of ten thousand dollars for "the New York enterprise." I never received any money from Mr. Wright, except $50 or $100 myself. I have demanded a reconveyance, and Wright claimed he held the land as security for $5,000 he had advanced Mr. Haldane, and he wanted the $5,000 and interest before he would deed it back to me. The deed from Blackman and wife to Phelan was executed by me in Omaha. I wanted some money, and went to Mr. Phelan to borrow and gave him the deed to this farm for that, and told him I was indebted to Mr. Savage and wanted to leave the title with him as security for that indebtedness, and also for what other money I might need. It was given as security for the money advanced by Phelan. In September, 1892, I was called to Omaha *by telegram from Judge Duffie*, stating that the Wright case was set for trial. *I then went to Phelan and for the first time ascertained that Phelan had given Duffie a mortgage for $5,500.*

52 *Duffie* came to me and requested me to ratify that mortgage, and upon his delivering to me a paper that recited a fact that he released any claim on the New York property, I ratified it. The contract was verbal, but was afterwards drafted into a written contract.

The contract that was finally agreed upon was signed in New York city; it was sent down by Duffie to me to be signed, and evidenced the contract made between Phelan and I at the time.

Something over $1,100, has been paid me on this contract. Phelan assumed the indebtedness for which the deed was originally given as security to Savage for $1,000 and interest; he also assumed the mortgage for 5,500, which had been given to Duffie.

Cross-examination on the part of Dull, defendant:

The original arrangement as to how this Wright deed was to be delivered was arranged between me and Mr. Wright, and there was nothing said at the time about his advancing money to Haldane. I had this arrangement with him in New York city. He only advanced me $100, and I gave him my due bill for it, which he still

holds. When I demanded Mr. Wright to reconvey this land he claimed he held it as security for the money advanced Mr. Haldane before the delivery of the deed. Here is a bill which Mr. Wright presented, and for which they claimed payment prior to the reconveyance of the property:—

"Bill showing payments to Chas. Haldane, through the Council Bluffs savings bank, aggregating $5,057.39, and beginning
53 March 30, 1889, up to August 27, 1889, and *all but $100 having been paid prior to August 17, 1889.*"

For the amount of this bill they claim to hold the land as security. I received the following letter from Mr. Haldane, which he told me he had received from Mr. Wright with instructions to show it to me. Letter, as follows:

"COUNCIL BLUFFS, IOWA, *Aug.* 19, 1889.

DEAR HALDANE: On my return from Chicago, I received the deed to the Dull land from the post-office, in registered letter—the deed from Dull and wife to Blackman and Blackman and wife to myself. I have not put them on record yet, but will today.

Yesterday I received yours of the 16th, and note what you say therein. We will try and take care of your check to Mr. Sanderson in payment of your Hawkeye insurance, although we have not as yet made any definite arrangements for money to cover future expenses in the New York enterprise. Coming home from Chicago, John and I discussed the matter of getting at the owners of the property on Broadway, and we both agreed that if negotiations for settlement with those parties was to be the method of procedure, that it would not be the wisest thing to do to notify all said occupants at once of our claim, and of what we expected, etc., and it *does seem to me that this interview you have reported in your last letter, wherein the meeting to try and negotiate a settlement with Mr. Lyon* developed, as it did, that you were dealing with the attorney of Mr. Vanderbilt, another of the occupants, and who was then and
54 there advised of your claim to the Vanderbilt property, ought to convince you that the idea of serving a formal notice on these occupants is not the best way to bring it to their attention, provided, as I have before said, that negotiations for a settlement is to be the method of procedure at first. In other words, it seems to us that you ought to pick these occupants up one by one as opportunities present, and deal with them that way, one by one. It is said that the best way to fight a battle is to take the forces in detail; your plan would imply that you would have them all mass their forces against us and then that you are ready for them, and all they had to do was to come on.

Now, nobody ever made any settlement with litigants in that way, and hence we decided to send you the telegram we did, thinking that if you did not see proper to adopt our suggestions, a few days' delay would not probably militate very much against our interests.

Now it seems to me, and to both of us, that you will accomplish very much more in the way of settlement, if you pursue this plan than you would to carry out the one you suggested. You under-

stand that that would be our way of procedure in regard to that particular phase of the case.

We feel very much encouraged at the result of *your interview in the Lyon matter, and it certainly looks, from Lyon's attorney taking that view of the question, and his advising Lyon accordingly,* that he could not do otherwise than advise his client Mr. Vanderbilt, in the same way which would be of course tantamount to a settlement of both cases.

You seem to have a wrong idea entirely in relation to John's idea about the settlement, or negotiations for a settlement of these
55 cases. Of course, while he and I are furnishing the sinews of wars, you must expect we should have some anxiety in regard to the speedy adjustment of some of the cases at least, so as to make this thing self-supporting, and this brings us directly to the manner or policy of bringing about these settlements.

Now, his idea, and it is mine as well, is, that if you are going to settle anything by compromise, why the better acquainted you are with the parties with whom you have to deal, and the better you stand with them in every respect, and the more intimate relations you can get up with them in every way, that as a general rule, it follows that you can make a correspondingly better adjustment or settlement with them. And while that may not be your way, it would certainly be mine. That is, if I wanted to settle with a man who was a stranger to me, I should feel that the better acquainted I could get with him and his friends, and the nearer I could get up to all of them, the chances would be I would have the better success in making my settlement. You say that money cannot be charmed out of those people—out of their pockets—any more than it can be out of mine. They may not be as ugly as I am, but you know, Haldane, that a man can get a great deal more money out of my pocket by being nice, and kind, and good, and gentlemanly to me, than he could by just coming forward and making a demand to pay over what little I have got because he claimed a better title to it. I think that illustrates the position exactly.

In regard to John going down there to assist you and Mr. Blackman in the matter of these negotiations, while I am still of the opinion, the same as Judge Hubbard expressed to you at Chicago,
that he can be and would be of very great assistance in
56 bringing about this settlement, if he was there; at the same time, if you are opposed to his going, it would not be very pleasant, of course, for him to go there and proffer his assistance under any such state of feeling. But, if it is thought by us that such would be the most politic course to pursue, why then I think you ought to raise no objections whatever to his going. As to his going down there at present, I don't see how he can do so, and I don't understand he expects to unless some exigency should arise whereby it would be imperatively necessary for him to do so. Matters here are in such shape as to require some one to look after them who is familiar with them, as you and he would be, having had the business under your charge from its inception.

Now, in justice to myself, whom you, as well as Mr. Baldwin and

Judge Hubbard, have admitted as the more responsible party in the matter of raising funds to carry on this war—in the matter of guaranty of the contract which you have given to the heirs—I think, and I have no hesitancy in saying to you, and Mr. Blackman also, that he should make me a right-out, absolute deed to all the property, deeding to me his entire interest, together with that of the heirs, and that should be sent to me to hold in trust. For what? For my protection, your protection, Mr. Baldwin's protection, Mr. Blackman's protection, and the protection of the heirs, as well as the protection of all of us against the heirs, when we come to make a final settlement with them in regard to the proceeds which we may derive from this property. Now, it is no argument to say that the deed lying in my safe would be a great inconvenience to you people there, in making these settlements. I do not wish to waste any words about that, because there is nothing to it, nor is there anything in your argument about the validity of the deed.

57 You thought best, as a matter of protection to yourself, and I suppose to us, to have a deed so given me which you hold in your hands. If that deed is good, the deed to me would be good.

You say you have a deed already, in your safe. Now, if it would not be just as convenient to have it in my safe, why I cannot see the reason why, and I think that, while you have assumed no responsibility in this matter, except simply the matter of attending to the business, and Mr. Blackman has assumed none whatever in any respect (for I notice that when he deeds me the Dull land he simply gives me a quitclaim). I think, I say, that under that state of affairs it would look very much better to fair-minded people that you and Mr. Blackman should divest yourselves of what title you have in that property and put it in the name of the man who was standing at your back and furnishing the sinews of war for this enterprise.

Now, I come to the question of readjustment; it is so superbly ridiculous to me, Haldane, to think that a man like Mr. Blackman, because he happens to discover this old woman, who told him about this matter, and then brought it to you as an attorney, because he had not the means and ability to carry on the matter himself as it should be—that he, in that situation, should receive as much out of this enterprise as the firm of 'Wright, Baldwin & Haldane,' who furnish not only the '*sinews of war*,' but as much labor and all of the more important brain-work that is expected to be used in carrying it out to a successful issue; and, hence, I think and ask, and, I might say, as well, demand that a readjustment be at once made with Mr. Blackman, by which he shall receive one-third and we two-thirds of the one-half that we do not have to account for to the heirs.

58 My understanding was that your contract with Blackman was to the effect that he was to pay all expenses that might be incurred in working this case up to a successful issue, but instead of that we have furnished all the means thus far. You have been there eight months; have furnished quite as much labor as he has

in that time, and have paid not only your own expenses, but his also, and in addition have furnished all the brain-work and taken all the chances of ultimate success in the enterprise, placing your firm in the light of absolute guarantor of everything that he may do or has done in connection with this matter.

This new contract of adjustment, when made, should be made with Mr. Blackman and the firm of Wright, Baldwin & Haldane.

I also would like to have you send me a copy of the contract of guaranty which you have executed to the heirs for this property.

Of course, it is expected you will show this letter to Mr. Blackman, if you desire it. Please let me have a reply as early as possible.

Yours truly, GEORGE F. WRIGHT."

At the time I made the conveyance to Phelan, January 30, 1892, it was originally given as security for moneys advanced at that time, $75.

The consideration of $15,000, expressed in the deed, was not received, *$75 was the only cash consideration. I didn't know when the mortgage was given by Phelan.* There was also an understand-
59 ing between Duffie and I, that out of the proceeds of the land he was to receive the amount he had agreed upon for his work down there in the New York enterprise. It was with this end in view that Mr. Phelan should hold it. And when it was final, *I wanted to leave the title here; I had other reasons for it. Phelan didn't know anything about this arrangement, but made the mortgage without my knowledge and consent.* At the time I made the deed I didn't tell Phelan how much I owed Duffie or Savage. I simply told him I owed Savage. I had given no note or evidence of indebtedness at that time to Duffie, nor did I ever at any time execute any. I owed him (Duffie) an attorney fee for a number of years—1888 and 1889. When I executed the deed to Phelan, January 30, 1892, I never got any money from him; *all the money I received was through Judge Duffie.*

I think I had $50 when I left, in September. After returning to New York, to my recollection I got $75 more. This was before January, *after I had the meeting in Chicago with Mr. Dull.* Afterwards, I think I got $350, I believe, from Duffie. It was either sent me or telegraphed me, or by check, I can't remember. I think I next got $150, perhaps, November, 1892, and $375 the following January, is my recollection; and afterwards, in May following, $50, which was the last payment. *It was all received through Duffie. All the business was done through him, and I would write to Duffie, and he would send it to me. Duffie was acting as attorney for Phelan in the matter, as I understood.* Whenever I wanted any money I wrote to Duffie and he would send it to me. *I don't know where he got it.*

I owed Colonel Savage about $1,000, which was evidenced by notes and sight drafts, I think, in 1887 or 1888. I don't know whether I ever gave a note for the amount, or not. Phelan
60 was to pay this, in the written contract. *Don't know whether he has ever paid anything to Savage or Duffie, or not. I had*

never given Duffie a note or due bill, or anything of the kind. The arrangement first was, it was to be paid out of money that came from New York, and I hadn't got any that I could spare. All the agreements and understandings between us were reduced to writing about October 3, 1892. At the time of the contract I talked over with Phelan about the condition of the title. I think I showed him my deed from Dull, and told him Mr. Wright had a claim, and that there was a mortgage of $10,000 placed on it by my grantor. And he knew that Wright was in possession of the land under his deed. And he knew he would have to have a lawsuit with Wright to get possession, or pay him his money.

Additional cross-examination by defendant Wright:

This statement of account, referred to, was presented to me as a basis of settlement; I supposed it contained what was due Wright. It was before the action was brought against Mr. Dull.

Redirect:

I could not figure up now, the indebtedness due Savage.

Additional cross-examination on the part of Dull:

At the time of making the contract with Phelan, my suit against Wright had been pending ever since February 28, 1892. I don't know whether Mr. Wright had filed his cross-petition in it, or not.

61 Col. F. P. SAVAGE.

I had a talk with defendant Wright, in Council Bluffs, in regard to his holding this land for security. Wright refused to give any money to Blackman until he could get the money that Haldane owed him.

Mr. Blackman wanted his deed back, and Wright refused to give it to him. He said Mr. Baldwin knew the exact amount, but he couldn't tell exactly—about $5,000.

Cross-examination:

He said he proposed to hold the land until he got the money—the money that Mr. Haldane owed him, or the firm of Wright, Baldwin & Haldane, prior to the time he obtained his deed.

EDWARD PHELAN, intervenor.

Live in Omaha; had a conversation with Wright in September, 1892. He claimed to be holding it for $5,000 or $6,000, money advanced Haldane on the New York enterprise. I was negotiating for the purchase of the land at that time.

Cross-examination by defendant DULL:

The conversation was in Wright's office, in September, 1892. He offered to reconvey on the payment of this money. The conversation was principally between Mr. Duffie, Blackman and Wright. I was there to get him to reconvey to fix up my title.

Redirect:

I never learned that Mr. Dull claimed any interest in the
62 land until I was served with that notice last fall of a suit from New York.

Cross-examination by WRIGHT:

The notice was served on me in Omaha. I didn't appear in the case.

Cross-examination by DULL:

Q. *Did you ever make any inquiry about Mr. Blackman's title?*

A. *No; Mr. Duffie wasn't there. I didn't inquire about the title at all.*

Q. *You made no inquiry?*

A. *No.*

Q. *At the time you got the title, in January, from Blackman, didn't he explain the title to you?*

A. *I don't know as there was any explanation made.*

Q. *Didn't you know at that time that Blackman didn't have any title?*

A. *Well, I don't know.*

Q. *Didn't you know he had deeded the land to Wright and didn't have any title at all?*

A. *Yes, sir; I did. I knew he had commenced suit to get his title back from Wright, and I understood he gave Dull some property for it in New York city. I understood Dull had made a trade for some property in New York city.*

Q. Did he say that Dull had sued him in New York city?

A. He did not.

63 Q. Didn't he say there was an action pending in the supreme court of New York?

A. He did not.

Q. *You didn't make any inquiry?*

A. *No.*

Q. Do you pretend to say that all that Blackman said was that this was property he had traded for in New York with Mr. Dull?

A. *I relied a great deal on what Mr. Duffie told me in the whole matter. He was my counsel in the matter, and I relied on his statements as to the title. I never saw the land, never was on it. I expected the title was all right. I relied on Duffie.* I expected to have to pay $15,000 for it. Mr. Wright's claim, Mr. Duffie's, and Mr. Savage's, and the $10,000 mortgage that covered the whole track, there might be some doubt about that.

Q. Did you get an abstract of title?

A. *I am not posted on abstracts. I relied on Mr. Duffie. He was my agent in negotiating the sale. He drew this contract for me, October 3, 1892, and drew the deed for me and executed it as an attorney-in-fact for Mary E. Blackman, and I relied on his judgment, and he advised me to buy the property, that the title was all right, and I took his advice and bought it. I never asked Duffie whether Blackman and Dull were having a lawsuit about the land or not. I didn't have any occasion to. I knew*

there was a lawsuit pending, but I had the privilege of settling it if I wanted to. But I at once intervened and filed my petition of intervention. I knew at the time of getting the conveyance that the title of the land was in Wright. I knew that Blackman would have to set aside the deed to Wright before I would have any title.

64 I was not posted on matters of that kind, *but relied on Mr. Duffie, I presume.* I first paid Mr. Blackman $75, when the deed was executed. I bought the land on Duffie's representations, and relied upon it, and *never inquired what was going on in the courts of New York between Blackman and Dull. I don't know that I had any reason to. I was served with notice of the suit in New York the 24th day of December, 1892. I filed my petition of intervention September 17, 1892, before this contract was executed. Duffie was acting as my attorney in the matter, and also, I suppose, for Mr. Blackman.* As soon as I got the deed from Blackman I went and made a mortgage to Duffie for $5,500. Duffie showed me a letter from Blackman, and executed it on that authority. Duffie told me the amount. I never heard Blackman make any opposition to it. *Judge Duffie is a friend of mine. He has been transacting my business in Omaha in a legal way. After I paid Blackman the $75, in January, 1892, I can't give the date when I next paid him anything. I can't give the dates of any payments I made. Some money was paid after September 17th. The transactions were entirely or almost entirely between Judge Duffie and Mr. Blackman, and he acted as my agent in remitting to Blackman and also Mr. Blackman's agent, I suppose, expenses to New York city. The $75 paid was for Blackman's expenses to New York city. I am not in the habit of taking mortgages on 600 acres of land for $75 to pay a man's expenses from here to New York city.* I was acquainted with Blackman; he had been down there several time-, and through Duffie and the friendship that existed between Duffie and Blackman—but for that I don't know as I would give him $75.

Q. *Duffie was the reliable man you depended on in the transaction?*

A. *Well—his advice.*

Redirect:

65 Blackman proposed giving me this deed for the $75. I did not ask it of him. I understood that Mr. Duffie had gone out and examined the land, and I had a conversation with him about it. He told me the land was worth from $25 to $35 an acre. The money I paid to Blackman was *in checks, payable to the order of E. R. Duffie.*

(Witness identifies checks "J" to "O," inclusive.)

Cross-examination by defendant DULL:

(Witness identifies checks on Omaha National bank, payable to the order of E. R. Duffie, endorsed by him and signed by Ed. Phelan, being Exhibits "J" to "O," as follows:

January 30, 1892—$75.

August 30, 1892—$125.

November 29, 1892—$150.

October 3, 1892—$100.
October 12, 1892—$400.
March 23, 1893—$100.
April 1, 1893—$50.
January 6, 1893—$375.)

Q. How do you know that Mr. Blackman got the proceeds of these checks?

A. *I couldn't say that he got the proceeds of any of them. All I know is, I gave the checks to Duffie to go to him.* I can't swear who got the money, outside of Judge Duffie. The only one I personally know that Mr. Blackman received was the first one for $75. I gave that to him personally. *I paid the others on Mr. Duffie's demand. I went on paying the money after I was served with notice. The check for $375*
was given after I was served. I never examined the records in
66 *this case to see if Dull had filed a cross-petition. I went on paying the money, all the same; it didn't make any difference. I was paying the money right along, whether Dull claimed the land or not. I was told by Judge Duffie that that notice in the New York case didn't cut any figure, and that I should go on paying just the same; that Blackman needed the money. The dates of the checks show the dates I paid the money; they have the proper dates.*

Q. So, it didn't make any difference if the land had dropped down or become submerged in the ocean; I suppose you would have paid on Mr. Duffie's request?

A. *Oh, I don't know about that.*

I have never paid Duffie anything on his $5,500 mortgage, nor Savage anything on his obligations, and all that I ever invested in these 550 acres are these checks in evidence, that I gave to Duffie for that purpose, excepting the $75 check I gave to Blackman. I wouldn't swear but part of this money was money advanced to Duffie on account of his services. He might have taken part of this money and used it and replaced it in some way or other to Blackman; I couldn't say for that. I never paid Duffie for services in any other way. There might be some other checks I have paid Duffie on attorney fees, when it was I can't tell. I will not swear that any of these checks were given on attorney fees.

Redirect:

I estimated it would take about $15,000 to get a clear title to the land. *Didn't know but what it might cost that much before we got through with it.*

Recross-examination:

I relied on Judge Duffie's statement as to the value of the land.

Q. I believe you stated you were a contractor in Omaha?
67 A. Yes.
Q. You are not in the real-estate business?
A. I am.
Q. That is, you have a real-estate office?
A. *Well, I take a hand at most anything.*
Q. *Sort of an all-round speculator?*
A. *Yes, sir.*

E. R. DUFFIE narrates as follows:

Lawyer, Omaha. Wright told me he held the legal title, and would hold it until he was paid the money he had sent to New York to be expended in the scheme there. He stated that Haldane and Blackman were interested in the "New York deal," and that Haldane and Blackman were interested together, and that this land was part of the proceeds of it, and ought to be held for the payment of the money that he had advanced to help prosecute it. He had paid taxes on the land $201.80, and $354 expenses, and collected $2,062 rent.

Cross-examination on behalf of defendant Dull:

This was after the conveyance had been made to Phelan, in January, 1892, after I had left for New York. The way I happened to be there, *Mr. Blackman was very anxious to sell the land, and I was very anxious that the title should be settled up so that I might get something out of my claim; and I knew that Phelan was quite a speculator, and I got him and Blackman together, and we all went down there to see what Wright would settle for.* He gave us these figures,
68 and Phelan agreed to pay the amount the next morning. Afterwards he called me to one side and said that *a friend of his had advised him that until the Holcomb mortgage and some other New York claim that was apparently a lien upon the land was removed in some way, not to pay out so much—so large an amount as that.* Phelan didn't have any interest at that time—in September. He had already filed a petition of intervention, but it was before the execution of the contract.

Intervenor Offers in Evidence Contract Between Blackman and Ed. Phelan.

This agreement, made this 15th day of September, 1892, by and between John E. Blackman, of the city of New York, party of the first part, and Edward Phelan, of the city of Omaha, Nebraska, party of the second part, witnesseth:

Whereas, the said John E. Blackman and Mary E. Blackman, his wife, did on the 30th day of January, 1892, convey to the said Edward Phelan by deed of general warranty, the following-described lands, to wit:

(Here follows a description of the land in controversy.)

And whereas, the said deed of conveyance was executed and delivered to said Phelan as security merely to assure to the said Phelan the repayment of certain money due and owing to said Phelan and others from the said Blackman;

Now, therefore, it is agreed that said deed of conveyance shall become absolute in fact and stand as a full and complete conveyance of the title to the land described therein, to the said Phelan,
69 and that the said Blackman shall as soon as can be done procure from his wife, Mary E. Blackman, an agreement on

her part that said deed shall operate as a full and complete transfer of all her rights in said land to Phelan.

In consideration, whereof, the said Phelan agrees on his part to pay George F. Wright, of Council Bluffs, Iowa, the sum of $5,000, claimed to be procured by said Wright for Charles Haldane, of the city of New York, at 8 per cent. interest thereon from the 3rd day of August, 1889, and for which sum said Wright claims to hold said land as security, but from said sum of five thousand dollars and interest is to be deducted the excess of the rents and profits received from said lands while in the possession of said Wright, over and above the taxes and other proper charges by him expended thereon, and said money is in no event to be paid said Wright until all liens of all kinds placed on said land by said Wright while the title stood in his name are released, and a deed to said land made by him and delivered to said Phelan, or a valid decree of court entered and confirming the title to said land in Blackman or Phelan, and a valid account, or one guaranteed to be valid by said Wright against the said Charles Haldane, assigned either to Phelan or to Blackman, and said Phelan may, if he chooses, contest and litigate the claim of said Wright to hold said land for security for the amount claimed by him to have been advanced to said Haldane, and to defeat said claim if he can do so, and recover said lands from Wright, divested of any claim by him made to hold the same as security for any sum or sums he may have advanced to said Haldane or others.

Said Phelan further agrees to pay the said Blackman the sum of $500 in cash, and a further sum not more than $500, in such amounts from time to time, as the needs of said Blackman may require.

70 Said Phelan further agrees to pay to E. R. Duffie, of Omaha, Nebraska, attorney's fees for services rendered, and to be rendered in and about said land, the sum of one thousand dollars, and which is not to be charged to said Blackman, and a further sum of one thousand dollars, more or less, to E. P. Savage, of South Omaha, Nebraska, the exact amount to be determined upon a settlement to be hereafter made between the said Savage and Blackman, and payment thereof to be made by Phelan when the land is appraised after title is established.

Said Phelan further agrees to prosecute such suit or suits as may be necessary to require any mortgagee of Daniel Dull, who conveyed said land to said Blackman, to satisfy their liens out of the property covered by their mortgages and still owned by said Dull, if the same can be done.

After the title to the land is fully established in said Phelan, he taking proper steps to attain that end, he agrees to have said land appraised by disinterested parties, and pay to said Blackman a sum which, together with that already paid to said Blackman and Savage, shall amount to one-half the net sum of the appraisal of said land, after deducting from the same the amount paid Wright and others to release lien.

In no event shall said Blackman be charged with or become liable

for any moneys paid out or expended by said Phelan for attorney's fees.

(Signed) ED. PHELAN.
JOHN E. BLACKMAN.
MARY E. BLACKMAN.

Acknowledged in Douglas county, Nebraska, by Ed. Phelan, before E. R. Duffie, notary public, October 3rd, 1892.

71 Acknowledged in the city of New York, by John E. Blackman and Mary E. Blackman, October 6th, 1892.

Intervenor rests.

Evidence of Defendant Wright.

JOHN N. BALDWIN.

Had a conversation with Mr. Haldane in reference to some money matters, *in the spring of 1889*, in New York. Mr. Haldane had told me about Blackman having a claim to certain property in New Jersey and New York city; that he had been working for two or three years getting deeds and records, and wanted Mr. Haldane to be his attorney.

(The defendant Daniel Dull objects to all conversations had between the witness and Haldane as incompetent, not the best evidence.)

He said Blackman didn't want any arrangement made with Wright, Baldwin & Haldane, which was the name of our firm. He showed me a written contract with Blackman, and we made an arrangement with our firm, the same as any ordinary business, and *it was to be for the firm's benefit.* Haldane thought it was a good scheme, and the property was valuable. He was to get one-half, and it would pay us to let him go down to New York and be on the ground and assist in the work. Haldane went to New York in November, 1888, with Blackman. I had been getting money and sending it to Haldane to prosecute the legal work of the case. Haldane said he had found out a man named Dull, who was on part of this land on Broadway—on this strip, and that negotiations were pending for a trade between Dull and Blackman, and he wanted

72 to know if he got this Pottawattamie County land from Dull in the trade if Wright would advance him any more money to carry on the enterprise. And he agreed if Mr. Wright would advance him $5,000, more money, that he would deed the land to Wright and he could hold it as security for the $5,000 advanced, and further advances. I came back to Council Bluffs and made arrangements with Mr. Wright to do so. The deed was executed by Blackman and forwarded to Mr. Wright under this arrangement. The bill offered in evidence was made for the purpose of a settlement with Phelan.

Cross-examination:

During all the time of these transactions Haldane was a member of the firm of Wright, Baldwin & Haldane, and was entitled to par-

ticipate in the profits of the business. The transaction belonged to the firm, the same as any other case, only the contract was made with Blackman by Haldane. Wright, Baldwin & Haldane had a contingent fee in the result of the litigation down there in New York city, and a certain percentage of what might be eventually obtained. The firm of Wright, Baldwin & Haldane was transacting its business, as usual, and Haldane was participating in the proceeds of the business at Council Bluffs. There has never been any accounting or settlement had between Haldane and the firm. At the time of these transactions Haldane was still a member of the firm. Our firm was to get 50 per cent. of the proceeds realized by Blackman out of the Hopper litigation. I was in New York *in August, 1889*, and insisted on Blackman making the contract directly with the firm, but Blackman wouldn't do it, said he had enough.

I don't know what Haldane did with the money we sent him. I don't know whether Haldane ever got any profits out of the Hopper deal for the firm; *he never reported any to us.*

73 GEORGE F. WRIGHT.

Member of the firm of Wright, Baldwin & Haldane. I borrowed $5,000, to send to Haldane, to further the Hopper scheme. Went to New York *July 11th, 1889*, and had a talk with Haldane, and complained about the Blackman deed not being delivered. He said it would be sent soon after my return home. I was not to advance $10,000 for the deed. After I got out my $5,000 I was to turn the balance over to Mr. Baldwin for the benefit of the New York enterprise. I took possession of the land in the fall of 1889, and have had possession ever since. I paid the taxes of 1889. Mr. Dull was here about a year ago, and made his first complaint to me. He claimed that the property that he had got from Mr. Blackman, on Broadway, New York, had subsequently been sold by Blackman to Mr. Lyon and deeded to Lyon, and he was shut out of it. I was served with notice of the suit in New York, last December (1892). I never appeared in the case.

Cross-examination:

Haldane was a member of our firm, and went to New York to represent the Hopper heirs' interest, in which our firm had a contingent fee. There never has been any settlement had with the firm and Haldane. What I know about the arrangement with Haldane is what Mr. Baldwin told me, *in March, 1889.* The letter which has been offered in evidence is my letter to Haldane, on receipt of the deed. The John referred to in my letter is Mr. Baldwin, of our firm. He was in harmony with the expressions of this letter.

Q. Didn't you consider it a fraud that Mr. Dull got nothing for his land?

A. *Well, I didn't consider it right, between the two men.*

74 Dull said he didn't get the land he was to get from Blackman for his Iowa land; that he hadn't got one dollar for the

land he had conveyed to Blackman. That Haldane had gone in and settled with Lyon and conveyed the land to him. *He claimed the consideration had failed, and he had lost his land in that way.* The Lyon mentioned in this letter is the same Lyon that got the property in place of Dull. Dull claimed *they had sold the property out from under him; that he had not got the land they contracted to give him for this Iowa land.* Dull came to try and make a settlement with me, and *I told him I must have Baldwin's consent.* After I got a deed to the land from Blackman, I mortgaged the property to Askwith for $5,000. He was a clerk in the office. This was an accommodation note he gave me. He had no money in it at all, but *it enabled me to use it to raise money.* He endorsed it in blank, and I got $5,000 on it from Mr. Millard, and turned the note over as collateral security. I owed him $6,000 at the time. I have never paid the note, and it is long past due.

Defendant George F. Wright rests.

Stipulation.

It is agreed that the summons, together with a copy of plaintiff's bill of complaint and order for injunction set out below, were served upon the defendants therein named, George F. Wright, A. W. Askwith, Ed. Phelan and E. R. Duffie on the 24th day of December, 1892, in the city of Omaha and Council Bluffs, and that no appearance was made by them in said action.

Summons, complaint, and order of injunction served upon the defendants as above stipulated, as follows:

75 Supreme Court, Westchester County.

DANIEL DULL, Plaintiff,
against
JOHN E. BLACKMAN, MARY E. BLACKMAN, GEORGE F. Wright, Asa W. Askwith (Asa Being Fictitious, Christian Name Unknown), Edward Phelan, Edward R. Duffie, Defendants. } Summons.

To the above-named defendants and each of them:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear, or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Dated New York, Nov. 3rd, 1892.

MARTIN J. KEOGH,
Plaintiff's Attorney.

Office and post-office address, No. 5 Beekman street, Temple court, New York city.

To the above-named defendants, George F. Wright, Asa W. Askwith (Asa fictitious, Christian name unknown), Edward Phelan, and Edward R. Duffie:

The foregoing summons is served upon you, without the State of New York, pursuant to an order of Hon. Jackson O. Dykman, a justice of the supreme court of the State of New York, dated the 17th day of December, 1892, and filed with the complaint in
76 the office of the clerk of the county of Westchester, in the State of New York, at White Plains, in said county.

MARTIN J. KEOGH,
Plaintiff's Attorney.

Temple court, New York city.

Supreme Court, Westchester County.

DANIEL DULL
against
JOHN E. BLACKMAN, MARY E. BLACKMAN, GEORGE F. WRIGHT, Asa W. Askwith (Asa Being Fictitious, Chrissian Name Unknown), Edward Phelan, Edward R. Duffie.

Plaintiff complains and alleges:

First. That plaintiff is a resident of the county of Westchester, in the State of New York.

Second. That the defendants John E. Blackman and Mary E. Blackman are also residents of the State of New York.

Third. That the defendants George F. Wright and Asa W. Askwith are residents of the State of Iowa, and the defendants Edward Phelan and Edward R. Duffie are residents of the State of Nebraska.

Fourth. That on the 25th day of June, 1889, plaintiff was the owner in fee-simple of certain lands in Pottawattamie county, Iowa, described as follows, namely: The south half (S. ½) of section numbered four (4), the northeast quarter (N. E. ¼) of section numbered nine (9), the northeast quarter of the southeast quarter (N. E.
77 ¼, S. E. ¼) of section numbered nine (9) and thirty-one $\frac{6}{100}$ acres out of the southeast quarter of the southeast quarter (S. E. ¼, S. E. ¼) of section numbered nine (9), (being the same part of said last-mentioned forty-acre tract heretofore conveyed to Daniel Dull by George F. Wright), all in township seventy-six (76) north of range forty-two (42) west of the 5th P. M., in all $551\frac{6}{100}$ acres.

Fifth. That a short time previous to said 25th day of June, 1889, the defendant, John E. Blackman, intending to cheat and defraud this plaintiff, approached plaintiff and represented to plaintiff that a certain parcel of land in the southeast corner of Broadway and Fifty-first street, in the city of New York, which plaintiff had leased from one A. M. Lyon for a term of years, and upon which plaintiff had erected a substantial building and which plaintiff then occupied, did not belong to said Lyon, but belonged to said Blackman, and that he was about to begin a suit against said Lyon and this plaintiff to eject plaintiff therefrom.

Said Blackman at the same time represented that the title to the

land had, until recently, been vested in the heirs of one John Hopper, some two hundred in number, that he had obtained and held conveyances from said heirs, representing about eighty-five per cent. of the title, and that he had made arrangements by which he should shortly obtain conveyances from the other of said heirs.

Sixth. This plaintiff relying on the truth of said statements and representations so made by defendant Blackman, and believing said statements and representations to be true, entered into a contract whereby plaintiff agreed to convey to said Blackman *to* the Iowa lands hereinbefore described, and said Blackman agreed to
78 promptly prosecute his suit to recover said land at Broadway and Fifty-first street, New York city, at his own expense, and to a final determination, and in the event that he succeeded he would give to plaintiff a conveyance thereof, and put plaintiff in possession thereunder. And before entering into said contract said Blackman expressly represented that he was the possessor of ample funds and property wherewith to prosecute said action.

Whereupon, relying upon each of said representations and being solely moved and induced thereby, plaintiff, on the 25th day of June, 1889, made, executed and delivered to said Blackman, a good and sufficient deed, with full covenants of warranty, conveying to him the lands in Iowa hereinbefore described, and said Blackman, on the 20th day of August, 1889, caused the same to be recorded in the office of the recorder of deeds of Pottawattamie county in Book 208, at page 311.

Seventh. Plaintiff further alleges that each and all of the representations so made by said Blackman as aforesaid, were false and untrue, and were known so to be by said defendant Blackman at the time of making the same. That in truth and in fact said Blackman had not at that time about eighty-five per cent. of the title of said Hopper heirs, nor as plaintiff is informed and believes, more than fifty-five per cent. thereof, and he had not, in fact, any prospect or belief that he would ever acquire the whole, or nearly the whole of said title, and in truth and in fact of the portion of said title which he had acquired more than *than* twenty-five per cent. had been conveyed, or pledged, by him to other persons, so that he could not control or regain it; and that in truth and in fact said Blackman had not at the time of making said representations any funds or property wherewith to employ counsel or prosecute his claim to the property in plaintiff's possession, and has never since
79 that time been possessed of any such funds or property, and that said statements and representations were made by said defendant Blackman for the purpose of deceiving, cheating and defrauding this plaintiff.

Eighth. Plaintiff further states, upon information and belief, that the defendant John E. Blackman has lately commenced an action in the district court of Pottawattamie county, Iowa, against plaintiff and Nellie M. Dull, plaintiff's wife, claiming in substance that he is the absolute owner of said Iowa lands, and asking that plaintiff and said Nellie M. Dull be declared to have no claim thereto, and no interest therein. That said Blackman has frequently, since

the 25th day of June, 1889, promised to reconvey said Iowa lands to plaintiff, but has neglected, and now refuses so to do, and instead thereof has commenced said action for the purpose of putting plaintiff to great expense and trouble, and thereby compelling plaintiff to submit to paying said Blackman a sum of money for said reconveyance.

Ninth. Plaintiff further states upon information and belief that on the second day of August, 1889, defendant Blackman executed a quitclaim deed of said lands to the defendant George F. Wright, which was done without any consideration, in money or otherwise, and said Wright, on the 16th day of November, 1891, without any right or authority from this plaintiff, executed a mortgage on said lands to one A. W. Askwith, purporting to secure the payment of the sum of five thousand dollars, which said mortgage plaintiff alleges upon information and belief, was executed and delivered without any consideration; that on the 30th day of January, 1893, said Blackman again conveyed said lands to the defendant Edward Phelan, but such conveyance, as plaintiff is informed and
80 believes, was made to secure the sum of seventy-five dollars only, loaned by said Phelan to said Blackman, with full knowledge of plaintiff's claim to said land; and that on the 27th day of August, 1892, said Phelan executed and delivered to the defendant Edward R. Duffie, a mortgage upon said lands, to secure to said Duffie, who is an attorney-at-law, certain fees which defendant Blackman had agreed to pay to said Duffie for defending said Blackman against plaintiff's claim to said land, said Duffie at the time making said contract, well knowing that Blackman had obtained the deed from plaintiff by fraud.

Tenth. Plaintiff further states that said Iowa lands are worth the sum of fifteen thousand dollars, or more, that defendant Blackman has obtained possession of them, and has either personally, or through defendant Wright, collected the rents thereof, aggregating, as plaintiff is informed and believes, three thousand dollars, and that defendant Blackman is not only insolvent, but has no visible or available property, real or personal. Upon information and belief, plaintiff states that each of the defendants, grantees and mortgagees of said Iowa property, well knew that the title to said property had been obtained from plaintiff by fraud and deceit by defendant Blackman, prior to acquiring any alleged interest therein or claim thereto.

Wherefore plaintiff prays judgment adjudging the said deed executed and delivered by plaintiff to defendant John E. Blackman on the 25th of June, 1889, to have been obtained by fraud and false representations, and to be therefore, void, and ordering the said defendant to execute a good and sufficient reconveyance to plaintiff thereof, reciting the finding and decision of this court in that
81 regard, and that the said defendant John E. Blackman be enjoined and forever restrained from prosecuting said action in the district court of Pottawattamie county, Iowa, or any other action affecting said lands against the plaintiff and his wife Nellie M. Dull, or either of them, and from executing any further or other

conveyance of said lands, or from encumbering the same in any way, and providing such further and other relief as in equity the plaintiff may be entitled to.

MARTIN J. KEOGH,
Plaintiff's Attorney.

Temple court, New York.

CITY AND COUNTY OF NEW YORK, *ss:*

Daniel Dull, the plaintiff in the above-entitled action, being duly sworn, says: He has read the foregoing complaint and knows the contents thereof, that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

DANIEL DULL.

Sworn to before me this 3d day of November, 1892.

WM. L. SNYDER,
Notary Public, New York County.

Supreme Court, Westchester County.

DANIEL DULL, Plaintiff, *against* JOHN E. BLACKMAN, MARY E. BLACKMAN, George F. Wright, Asa W. Askwith (Asa Being Fictitious, Christian Name Unknown), Edward Phelan, Edward R. Duffie, Defendants.	Code of Civil Procedure, Secs. 610 to 621. Injunction by Order.

82 It appearing satisfactory to me, by the complaint herein and the affidavit of Daniel Dull that sufficient grounds for an order of injunction exist upon the ground that the plaintiff is the true owner of certain lands in Pottawattamie county, Iowa, described as follows, viz: The south half (S. ½) of section numbered four (4); the northeast quarter (N. E. ¼) of section numbered nine (9); the northeast quarter of the southeast quarter (N. E. ¼ S. E. ¼) of section numbered nine (9); and thirty-one and $\frac{66}{100}$ acres out of the southeast quarter of the southeast quarter (S. E. ¼ S. E. ¼) of section numbered nine (9), all in township seventy-six (76) north of range forty-two (42) west of the 5th principal meridian; that the defendant John E. Blackman by fraud has obtained from said Dull a deed, conveying said lands to said Blackman; that said Blackman is making conveyances thereof, and is encumbering the same; and has instituted a suit in the district court of Pottawattamie county, Iowa, against said Daniel Dull and Nellie M. Dull, his wife, for the purpose of obtaining a judgment against them that they have no title to or claim upon said lands.

I do hereby order, that the defendant John E. Blackman refrain from conveying or encumbering said lands or any part thereof, and from further prosecuting against said Daniel Dull and Nellie M. Dull said suit in the district court of Pottawattamie county, Iowa, or permitting the same to be prosecuted, and from commencing or

prosecuting any other action affecting the title of said Daniel Dull and Nellie M. Dull to said lands, until the further order of this court, and in case of disobedience to this order, you will be liable to the punishment therefor prescribed by law.

Dated November 9, 1892.

(Signed) EDGAR M. CULLEN,
Justice Supreme Court.

83 The defendants Daniel Dull and Nellie M. Dull, to sustain the issues in their answer and cross-petition, offer the following evidence:

Exemplified copy of the record in the case of Daniel Dull *vs.* John E. Blackman, Ed. Phelan, George F. Wright and E. R. Duffie *et al.*, in the supreme court of Westchester county, New York, as follows:

The People of the State of New York, by the grace of God, free and independent, to all to whom these presents may come or may concern, Greeting:

Know ye, that we, having examined the records and files in the office of the clerk of the county of Westchester, and clerk of the supreme court of said State for said county, do find a certain judgment-roll there remaining, in the words and figures following, to wit:

Supreme Court, Westchester County, New York.

DANIEL DULL *vs.* JOHN E. BLACKMAN, ED. PHELAN, E. R. DUFFIE, *et al.*	Before Hon. J. O. Dykman, Judge.

WHITE PLAINS, *April 29th*, 1893.

DANIEL DULL, sworn, testifies as follows:

84 Reside in New York; am engaged in boring artesian wells. In the spring of 1889 a card was left at my place of business, with the name of Wright, Baldwin & Haldane, attorneys, of Iowa, Mr. Haldane's name being underscored. Was acquainted with Mr. Wright, a member of the firm, having bought my land of him. On account of this acquaintance I called at the place indicated on the card, and found Blackman and Haldane there. Haldane said that his reason for calling was that Blackman had title to certain lands known as the old Bloomingdale road, and that they were there to get possession of the property, either by litigation or amicable settlement.

I told them I did not own the land, but had a twenty-year lease, and building, on it, the land belonging to a man by the name of Lyon. Haldane gave me a detailed account as to the title claimed. That one Hopper, a great many years ago, owned the land, and on his death, in 1779, had willed it to his children, and Blackman held title through them. Blackman said there were 200 heirs of Hopper scattered over the country, and that he had had a great deal of trouble to find them. They suggested that being situated as I was, I might

be a benefit to them in obtaining a settlement between them and my landlord. That they were very anxious to make a settlement, as it would assist them in making a settlement with others. I said that I would consider the matter, and left them. Afterwards I arranged a meeting with them at the Grand Central hotel, with an attorney, Mr. Lamison, in whom I had confidence. Haldane made a statement to him as to the nature of the title Blackman claimed. The point I wanted to know was when the road was vacated, as it had been, by straightening Broadway, who would own the land, to whom it would revert. That was the object of the meeting. Lamison thought the title would fall back to the Hopper heirs and that the title was good.

85 I next met Blackman at his office, and asked him as to the quantity of title he held. *He took his pencil and figured it up, and said 86 per cent.*, and that he was certain of getting the balance, excepting 4 or 5 per cent. *He said he had money and property worth $1,200* in Nebraska, and was to prosecute the claim and give the heirs one-half the proceeds. He had a contract with Haldane to give him one-half of his interest, or one-quarter of the whole.

I next saw Blackman at the Grand hotel. He first proposed to sell me the strip for $10,000 cash. I wanted to trade him western land, and agreed to give him 400 acres in case he succeeded in establishing his claim. This agreement was sent to Mr. Wright by Mr. Blackman, as Wright was interested in the deal, but he wanted the best land in the farm, the valley land. The result was, we finally settled on 551 acres, to be given in exchange for his interest in the Broadway property. Possession was to be delivered January 1, 1890.

I had a track of 1,385 acres in one body, on which there was a mortgage of $10,000 to one Holcomb, and I was to procure a release of it as to the 551 acres. Mr. Haldane drew up the papers and I executed the deed. A deed was also drawn up of the New York strip to me, and placed in escrow in the hands of one King to await the result of Blackman's litigation, which was to be pushed in a vigorous manner. It was subsequently placed in Mr. Haldane's hands in escrow. There was also a mortgage of $10,000 on the strip, to be delivered to me as an evidence of good faith and guaranty upon Mr. Blackman's part, but this mortgage it was agreed was not to be placed on record unless I should choose to do so to protect myself. But before I could place it on record for my protection in any manner, Blackman and Haldane had sold the strip to my landlord, Mr. Lyon, for $10,000 cash.

86 I had a building on the leased Broadway property that cost $45,000. The lease between me and my landlord was not satisfactory, and I had so indicated to Blackman. He decided it would be better to try and sell the whole property to my landlord, building and all, as it would save him the cost of prosecuting this claim, and it was decided that my deed and mortgage should not be placed of record, and I entered into negotiations with my landlord to sell him the disputed strip and the building together. I reported progress of these negotiations with Lyon to Blackman, from time to

time. Blackman claimed he had $2,000 in the bank and enough to carry on the litigation to a successful issue. But a few days afterwards he asked me to loan him $250 for expenses, and I then first believed he was deceiving me as to his financial condition.

Not long after I went into his office and reported to him how I was getting along with my landlord in the negotiations. He said to me: "Mr. Lyons has been in here to see me, and I think we are going to be able to close that matter up in a short time, but I think it is better that you stay away from him for a few days, and let me work with him."

I said, "All right, I will do that." A few days afterwards my landlord, Mr. Lyon, came into my office, and told me that he had bought the Broadway strip from Blackman for $10,000, and his deed was on record. I said, "I don't believe it," and went to Blackman's office and found Haldane in. He said Blackman was over at the recorder's office. We went there and found Blackman, and Blackman tried to get Haldane to tell me of the trick he had played me. Haldane refused to do it. He said, "You must tell him yourself." Finally Blackman blurted out, "I have done it"—meaning he had made the sale of the strip to Lyon. I spoke to him about the $250 I had loaned him, and left.

87 Afterwards Blackman wrote me, offering to convey the land, but he had already deeded it to Wright, and Wright had mortgaged it to Askwith, and it was but a trick to get me into a lawsuit, and get possession of certain papers.

Blackman, after this, deeded the property to Phelan, who then mortgaged it to Duffie, and before this Blackman had deeded it to Savage.

When I learned of these transactions in relation to my property out West, in order to give notice to the people that I still claimed it, I made a deed of it to my wife, Nellie M. Dull, to keep them from going any further, and began this action to set aside the conveyance to Blackman.

After the conveyance of the strip to Lyon, I next heard of Blackman through the following letter:

"CHICAGO, *Feb.* 2, 1892.

Daniel Dull, Esq., New York city.

DEAR SIR: I was at La Crosse yesterday; saw W. W. Holcomb, and he has agreed to meet you and me here at any time we may set. I explained to him all about my transactions with you in New York. It is impossible for me to come to New York to see you for some weeks yet, and this matter needs your attention at once, for George Wright will try to force a foreclosure of the mortgage. I am prepared to make you a proposition that will settle all matters of difference between you and I, I think satisfactory to you. I do not care to do so by letter, but must see you personally. I have a suit pending again-t Wright to cancel my deed to him. Wright, Baldwin or Haldane will not figure in the settlement between

88 you and I. In fact, I don't care to let them know anything about it. I am sure they have tried to do me up. I think

I can show you who was the author of the deal with you. Please wire me, care H. W. Martin, 119 Dearborn street, Chicago, when and where you will meet us. I must move quickly in this matter to protect our rights against the men who are trying to squeeze me, and with your co-operation I can do so. Don't stop to write, but come at once.

Very truly yours, JOHN E. BLACKMAN."

I went to see him a few days after the letter, and found him in company with a lawyer named Duffie, from Omaha. Blackman was trying to induce Duffie to take an interest in the New York deal, and have him take the place of Haldane as counsel. Duffie stated, in Blackman's presence, that he would not have anything to do with the New York deal until Blackman had settled with me to my satisfaction. That he would have nothing to do, and would not consider a proposition on a matter with such a cloud upon it. He stated that Blackman's conduct toward me was high swindling.

Blackman stated that that rascal, Haldane, had led him into this rascality, or whatever he might call it, that he not only had persuaded him, but had forced him into it, and there had never been a time since that he did not regret it, and intended to make me good for it.

He said he considered it his first duty to return to me the property in Iowa, in the condition he found it, and make me good for all damages in every way to my landlord. First of all, he agreed to turn back my land to me in the condition he found it. He
89 said he had a suit with Wright to compel him to reconvey the western land, and wanted me to act in unison with him in that suit, and that as soon as he could succeed in having the deed cancelled he would convey the property to me.

In addition to this he wanted to sell part of his New York interest, one-third of 25 per cent., which he owned. This was after we returned to New York. A memorandum of it was prepared, but as I found he did not own the interest claimed, it was never signed. He and Haldane claimed to have 50 per cent. between them. They then gave 21½ per cent. to Governor Hoadley for prosecuting the claim, leaving 37½ per cent. between them, and they then made an agreement that Blackman should take 12½ per cent. of the 37½ per cent. and sell it or put it up for money, and divide the proceeds between them. This contract was never signed between them. Blackman said he signed the first part, and by a trick got possession of it, and refused to sign the last section, in regard to the 12½ per cent., and when they had taken out 12½ per cent., that left them 12½ per cent. each, instead of his owning one-quarter.

In consequence of learning these facts, and learning that he didn't hold 86 per cent. of the property, no agreement was ever signed. I refused to sign it. I had already advanced him, on his representations as to his ownership, between $2,000 and $2,500.

Blackman never conveyed the property back to me in Iowa, but made a deed to a man by the name of Savage, and also to Phelan, and executed a mortgage on the land to Mr. Townsend; and with-

out telling me, got me to go security to Townsend for the amount that he had mortgaged my land for. He had also procured
90 a mortgage on the land for Duffie for $5,500. I refused to advance Blackman any more money, and he immediately went West and brought suit to quiet title to the Iowa land against me. I then arranged to get out an injunction here, restraining him from going forward, and he then withdrew from the suit and had Mr. Phelan substituted as principal in his place.

Cross-examination on the part of John E. Blackman:

I first met Blackman in the spring of 1889, and he first explained to me about the Hopper family. I desired to obtain the title to the Broadway strip for the purpose of negotiating with my landlord, Mr. Lyon, as to the terms of my lease. The lease provided that he was to buy the building, at the end of the lease, for $22,000, and the building had cost me $45,000. Blackman told me he owned 86 per cent. of the Hopper interest, which I found was untrue.

Redirect:

Blackman figured up his interest at 86 per cent. of the entire title. I relied upon the absolute amount of percentages. He had already conveyed the western land to some one else, and he couldn't redeed it to me.

CHARLES HALDANE.

Reside in New York city—attorney-at-law.

Have had dealings with Mr. Blackman in reference to the Broadway strip. Was never employed by Blackman as his legal adviser. I am working under a contract with him.

91 By the COURT:

Q. You do not admit that the relation of attorney and client existed between you?

A. No, sir.

In June, 1889 Blackman and I figured out what interest he had of the Hopper heirs in the Broadway property, and it *amounted to between 53 and 54 per cent.* At that time, June, 1889, *he did not have 84 or 86 per cent. of the interest in that title.* I have a written statement, showing Mr. Blackman's interest in that title, and *I know it of my own knowledge.* In June, 1889, *I knew Blackman was very hard up, and he admitted to me that he had no means.* We came here in December, 1888, and in February, 1889, he had to dispose of his interest in a portion of this very matter to raise $500. He was out of money. I don't know as he ever had any money of any consequence—not $500, to my knowledge. And we were together every day, until he sold this corner to Mr. Lyon, and got some money out of that.

This paper, here, is a deed that I held on this property. It was executed in February, 1889. Between that date and June, 1889, I think, Mr. Blackman complained that I was not sufficiently pro-

tected with that deed in my possession, and it was supplanted by another paper, which he also has in his possession. This changed it from an absolute deed into a sort of a mortgage.

I knew of the existence of the Holcomb mortgage—$10,000, on the Iowa property, at the time of these transactions and prior. Mr. Dull made the proposition to give Blackman three hundred acres absolutely of his Iowa land, and take his chances of Mr. Blackman getting possession of the corner, and 100 acres contingent on
92 his obtaining such possession. It was agreed that Mr. Wright, my partner, in Council Bluffs, from whom Mr. Dull had purchased this land, should make the selection, provided he did it fairly. There were several consultations, and Dull finally made the proposition that if we would let him select the land himself he would give us more, and he did select, as I remember, this identical 551 acres, now in this case.

During the negotiations I went to Chicago, to meet Mr. Wright, and see what the value of the land was, and what condition it was in, and whether we could make it pay. We wanted his judgment upon it. At that conference in Chicago, Wright informed me of the condition of the title; that the land was mortgaged for $10,000 to Holcomb, and *upon my return to New York Blackman and I talked it over.* You understand, this mortgage of $10,000 was on a 1,400-acre tract, of which we were getting 550. *Blackman and I concluded to take Mr. Dull's warranty deed, because the other 850 acres were worth very much more than the mortgage, so we determined to take his deed with the covenant of warranty to protect Mr. Blackman, and take our chances on getting the mortgage paid off out of the other 850 acres.* Nothing was said between Dull and Blackman as to whether there was a mortgage on the land or not. *We took the covenants of the deed and concluded to rely on that, and Mr. Blackman and I remarked—"Well, he has signed the deed with the full covenant of warranty in it."*

Blackman said he thought it would be all right, anyway, for the other land was worth a great deal more than the mortgage.

Mr. Blackman and I had a conversation in the office in regard to the interest he had in this Hopper property, in which refer-
93 ence was made to the form of the deed that had been placed with Mr. King in escrow for the Broadway property, and in that conversation I asked Mr. Blackman what Mr. Dull understood he was getting, whether we had got to give it to him—the whole title, or what he understood he was getting—and Blackman said it was something over 80 per cent.—84 or 86, I don't remember. He then remarked to me that *we didn't have that much*, and he said, "Well, we will get it anyway."

In July, 1889, Mr. Wright called at our office in New York; talked about my being away from Council Bluffs so long, and how I was going to make it in New York, and whether we were going to have money enough to prosecute this great big claim, and he said that he couldn't furnish me with any more money in New York—he was losing money at both ends—my services at Council Bluffs, and I was not earning any cash; but if Mr. Blackman would give him a deed for the land that he got from Dull, that he would take it,

and advance as needed, $10,000 on it. I got Wright and Blackman together, and a deed was prepared and signed by Blackman, and a memorandum showing the terms on which it was delivered to Mr. Wright. And Mr. Wright was to execute the memorandum and return it to me, showing the terms upon which he had received the deed. The deed was afterwards executed and sent to Mr. Wright, with a written memorandum, in my handwriting, showing the terms to be substantially as I have stated. He never returned the memorandum, but in return the letter dated August 19th, 1892. (See page 53, *ante.*)

Mr. Wright never advanced me any money on this land. Blackman, after Wright wrote this letter, deeded it to E. P. Savage, of Omaha, not to sell it, but in order to *block Mr. Wright in*
94 *operating*, and Blackman said that Savage, shortly afterward, gave him a deed back, which he put in his pocket. He said the *purpose of this conveyance was to block Wright from making any more contracts with the land, and that Mr. Savage might get possession and protect his interests.* In January, 1892, Blackman went to Omaha, and on his return told me he had given Ed. Phelan a warranty deed for the land, as security for $75, which he had to have to get back to New York with.

By the COURT: Does Mr. Wright now claim to hold that land?

A. Mr. Wright executed a mortgage, but took advantage of the deed, which Mr. Blackman had given him, to execute a mortgage.

Q. Did he record his deed from Blackman?

A. Yes, sir.

Q. And claimed to own it, so far as to give a mortgage on it?

A. Yes, sir.

Afterwards Blackman brought an action in Iowa, to cancel the deed to Wright, claiming the absolute and unqualified ownership. Subsequently, in September, 1892, Blackman agreed with Phelan to treat the deed given as security for $75 as an absolute conveyance, and Phelan was substituted as plaintiff against Wright and Askwith. And *Duffie is the attorney for both parties—Phelan and Blackman*, and claims a mortgage on it of $5,500, for fees. Blackman also made a mortgage on the Iowa land to one Townsend.

After Blackman begun the action in Iowa, an injunction was
95 issued in this action, restraining him and Phelan from prosecuting it, and he changed plaintiffs by substituting this man Phelan as plaintiff.

Cross-examination:

I was not admitted to practice as an attorney in New York until October, 1889. I was a partner with Blackman. Under our agreement it was not necessary for me to join in the conveyances by Blackman, of the Hopper family. He had the title.

Plaintiff rests.

Defendants' Evidence.

JOHN E. BLACKMAN.

Reside in New York city. Am defendant in this action. I left a card at Mr. Dull's office, and requested him to call at our office, on Broadway. I told him the nature of our claim; showed him a map of the property, and that we were gathering up as much of the title as we could, and had enough to assert it; and having seen Mr. Dull's name on the sign, on the corner, recognized it as the name of whom Mr. Haldane's partner, Wright, had done business with, and we called on him, thinking perhaps some amicable settlement might be made with him *which would influence a settlement with the others.* Dull stated that he was a tenant, under a lease, of the property, under a man named Lyon; that there were certain conditions in his lease which he had requested Lyon to change, and so far he had refused to do so, and he thought if he could control this interest, and it was what we represented it to be, he might get a favorable settlement with Lyon. Before we left *it was agreed with Mr. Dull, that Dull should have the first offer or opportunity to buy the*
96 *corner.* The matter was talked over, subsequently, in several interviews. Dull said he wanted it for the purpose of using it on his landlord. Told me what he had said to Lyon. He said he thought Lyon would pay a good price for the property, and that he had made Mr. Lyon an offer to take his building and the lease and clean up the title, but he didn't know whether Lyon would accept or not. The result was, a trade was made on the 25th day of June, 1889. I told Dull that I had obtained title to as many of the heirs as I had been able, and showed him the list. Dull gave me a warranty deed for the Iowa land for my claim against the corner on Broadway. I was to execute a mortgage and deliver it to him, for $10,000, and then execute a deed, and it was to be placed in escrow, with some one we might select, and we were to delay bringing suit against the corner until we should receive instructions. The delay of suit was for the purpose of making some settlement with Mr. Lyon. Dull executed and delivered his deed to me June 25th, 1889, and in August I executed a deed to Mr. Wright, of Council Bluffs, of the firm of Wright, Baldwin & Haldane, under an arrangement that he was to furnish $10,000, in sums as needed for the prosecution of this claim here. I delivered the deed to Mr. Haldane, who was to obtain a contract from Wright, showing the conditions under which he held the deed. Wright never furnished any money under the agreement, but claimed to hold the land for $5,000, which he said Haldane owed him. I began suit against him in January, 1892, to set aside the deed. He filed an answer that the deed was absolute, and also a cross-bill asking that the mortgages which were placed on the land by Dull be foreclosed on the land still owned by him, subject to the payment of the mortgage. Wright never advanced me any money on the land for the reason that it was mortgaged, and he wanted to deduct

$5,000 that Haldane owed him. I never confessed to Mr. Dull
97 that I was defrauding him with regard to this property. *The transaction between Mr. Dull and myself did not terminate as either of us expected it would,* and in all my talk with Mr. Dull I claimed he was as much to blame as myself. If he had released the mortgages so that the land could have been available for purposes for which it was exchanged, *the other deal would not have been necessary.* The $10,000 received from the sale to Lyon were deposited in some bank downtown, and part of it was given to Haldane and part to me. I brought an action against Wright to set aside this deed in Iowa. Wright filed a cross-petition and answer. Afterwards I made an arrangement with Phelan, in January, 1892, and borrowed some money of him and gave him a deed to this land. *The deed was given, not only to secure the amount of money, but to keep Wright from disposing of the land. I had deeded the land to Savage first for the same purposes,* but he had redeeded to me. In September, 1892, Duffie telegraphed me that my case against Wright was about to be tried. When I arrived I found it had been adjourned, and then negotiations began again, and I saw Phelan and tried to sell him the land, subject to Mr. Wright's claim.

Phelan first agreed to pay Wright the $5,000 he had advanced Haldane, provided he would assign his claim against Haldane to Phelan, or to me, and guarantee that he would furnish the evidence and put it in judgment; guarantee that it was a valid claim against Haldane. When they came to draw the papers Wright refused to do that, and finally *Wright told him he didn't have any claim against Haldane, that it was Mr. Baldwin,* and we stopped right there. Phelan paid me $50, and then sent me the balance to make up the $500, after I returned to New York. At any rate I have received $1,075
98 from Phelan, and Phelan has assumed a debt of one thousand dollars or thereabouts from me to Savage. He was the party to whom I deeded the land in the first place.

(Judgment for the plaintiff for the relief demanded in his complaint, and costs.)

Supreme Court, Westchester County.

DANIEL DULL, Plaintiff,
against
JOHN E. BLACKMAN, MARY E. BLACKMAN, GEORGE F. Wright, Asa W. Askwith (Asa Being Fictitious, Christian Name Unknown), Edward Phelan, Edward R. Duffie, Defendants. } Summons.

To the above-named defendants and each of them:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judg-

ment will be taken against you by default, for the relief demanded in the complaint.

Dated New York, Nov. 3, 1892.

MARTIN J. KEOGH,
Plaintiff's Attorney.

Office and post-office address, No. 5 Beekman street, Temple court, New York city.

(Here follows copy of bill of complaint in Dull *vs.* Blackman, as set out on page 76 *ante*.)

99 Supreme Court, Westchester County.

DANIEL DULL, Plaintiff,
against
JOHN E. BLACKMAN and Others, Defendants. } Amended Answer.

The defendant John E. Blackman, by J. Albert Lane, his attorney, for his amended answer to the petition of the plaintiff in the above-entitled cause, states:

For a first separate and distinct defense to the claim of the plaintiff,

I. That he admits the allegations contained in the first, second, third and fourth paragraphs of the petition.

II. Defendant denies that, intending to cheat and defraud plaintiff or otherwise he made any false representations to plaintiff; but says that a short time prior to the 25th day of June, 1889, the plaintiff came to the office of Charles Haldane, of 261 Broadway, in the city of New York, in response to a call, made some days prior thereto, at plaintiff's office by the said Haldane; and at that time in the presence of defendant, the said Haldane gave the plaintiff a general statement of the claim of this defendant to said property at the southeast corner of Broadway and 51st street. The plaintiff then and there represented to said Haldane and this defendant, that plaintiff was not the owner of said property, as defendant had supposed, but that plaintiff had leased the same for a term of years of one A. M. Lyon; that if the terms of the lease under which plaintiff held said property were strictly enforced by the said Lyon, plaintiff would suffer great loss and inconvenience thereby. That plaintiff had often requested the said Lyon to change the terms of
100 said lease, but that said Lyon had always refused, and insisted on the strict legal performance thereof. Plaintiff then asked this defendant if he would give plaintiff the first chance to purchase defendant's claim to said property, if upon investigation plaintiff found it as represented, and stated as his reason for wanting it that with it he could get even with Lyon. Afterwards at the request of plaintiff, the said Haldane and this defendant went with plaintiff to the Grand Central hotel, in New York city, and there met one Charles N. Lamison, a lawyer in whose opinion plaintiff claimed to have great confidence. The said Haldane then and there made a

statement in detail to the said Lamison and plaintiff, of the claim of this defendant to said property.

Defendant further says, that plaintiff was fully informed as to the claim of this defendant to the said property and the interest which had been conveyed by the heirs of the said John Hopper, deceased, and which was then held by this defendant. And defendant expressly denied that he ever made any statement to plaintiff that he did not believe to be true.

III. Defendant further says that after plaintiff had fully investigated defendant's claim to said property, defendant offered to take $10,000 cash therefor, or the equivalent in Iowa land. Thereupon plaintiff offered to give three hundred acres of his Iowa farm, the same to be fairly selected, and which should belong to defendant, whether his claim to said Broadway property should prove to be good or not. That if defendant succeeded, then plaintiff would give defendant 100 acres more adjoining the first three hundred acres, all to be free and clear of liens and incumbrances. That plaintiff would execute and deliver the deed to the three hundred acres, and execute a separate deed for the 100 acres, and place it in the hands of some person acceptable to both parties, to be delivered to
101 defendant as soon as his claim was fully established, and to be surrendered by plaintiff as soon as it should be finally and legally determined that defendant's claim was not good.

That therefor this defendant should execute a mortgage upon said property at Broadway and 51st street in such form as might be proper and satisfactory, and in case of success, to execute an absolute conveyance.

This defendant refused said offer so far as it related to the quantity of land, and the contingency. Negotiations were finally concluded by the terms of which plaintiff on or about the 25th day of June, 1889, made, executed and delivered to defendant a deed containing the usual covenants of warranty, for five hundred and fifty-one acres of his Iowa farm, which the said Dull represented to this defendant as being free and clear from all incumbrances and which was to belong to defendant, whether his claim to said Broadway property proved to be good or not, and in consideration therefor, this defendant executed and delivered to plaintiff a mortgage for ten thousand dollars upon said property at Broadway and 51st street, which mortgage plaintiff still holds. And also executed an absolute deed for said property, and delivered the same to Charles Haldane with instructions to deliver the same to one King, who was, as defendant believes, in the employ of plaintiff, and which delivery to said King was made.

IV. Defendant denies that he ever represented to plaintiff that he was a possessor of ample funds, and property wherewith to prosecute said action, but says that he repeatedly told plaintiff that all he wanted of said Iowa land was to convert the same into money wherewith to prosecute his claims against property in the city of New York and the State of New Jersey.

102 V. The defendant admits that on the 2d day of August, 1889, he executed special warranty deed of the Iowa land to

the defendant George F. Wright, and he alleges the fact in relation thereto to be that the said Wright had agreed with the defendant to advance him money as the defendant might need and call for the same, to an amount not to exceed $10,000, and that the conveyance of said land to the said Wright was made as security for the repayment of any moneys which might be advanced by said Wright to this defendant under the aforesaid agreement, and the defendant alleges that the said Wright refused to advance any money to defendant under said agreement, until defendant should procure the release of the mortgages placed thereon by plaintiff prior to the execution of the warranty deed to defendant, and has never loaned or advanced to the defendant any money whatever under said agreement under which he holds the conveyance of said land, but he pretends and claims to hold the same as security for $5,000 or upwards by him advanced, or claimed to be advanced to one Charles Haldane, and refuses to reconvey said land to this defendant, and that it was partly to remove the cloud cast upon the title of this defendant by said deed and partly to relieve said land from the lien of said mortgages placed thereon by plaintiff, that the action in Pottawattamie county, Iowa, was commenced and the original petition in said action made the said George F. Wright and his wife alone parties defendant therein.

VI. Defendant further admits that the said George F. Wright, had executed a mortgage on said property to the defendant A. W. Askwith, and defendant admits that to the best of his information said mortgage was executed and delivered without any consideration.

VII. Further answering, the defendant states that he ad-
103 mits the value of the Iowa land to be about $15,000, but says that at the time he received said deed from Dull, to wit: June 15, 1889, it was only worth about $10,000, as defendant was informed and believes. He denies that he has himself received any of the rents or profits derived therefrom, and alleges the fact to be that the rents and profits thereof have been collected by the defendant George F. Wright, and defendant has personally no knowledge or information sufficient to form a belief as to what amount has been received in rents and profits from said land by the said Wright.

VIII. Further answering, the defendant admits that he is willing and he did offer to reconvey said land to the plaintiff, but says that said offer was made upon the condition that the plaintiff should return to defendant the mortgage and the deed delivered to said Haldane, and all other papers given him by defendant in consideration thereof, of which offer the plaintiff took no notice, and to it made no response, and plaintiff then held, and still holds the mortgage which defendant gave him, and has never offered to release or return said mortgage to defendant cancelled, and neither said plaintiff nor said King have ever offered to return said deed or reconvey said lands to the defendant.

And for a second and separate defense to the claim of the plaintiff herein, this defendant repeating all the statements and allegations hereinbefore set forth, alleges:

IX. That prior to making said deed to defendant, plaintiff had

executed mortgages upon the said 551 acres of Iowa land, together with other lands owned by plaintiff, adjoining, for large amounts.

That at the time of the making of the contract with this
104 defendant and the execution and delivery by the plaintiff of the deed of said Iowa lands, the plaintiff knew that said mortgages were an existing lien upon said land, and the plaintiff fraudulently and falsely represented to this defendant that said lands were free and clear of all encumbrances. This defendant trusting and relying solely upon the representation of the plaintiff, and without any knowledge of the existence of such liens, received the deed of said premises from the plaintiff, and in consideration therefor executed and delivered to the plaintiff the said mortgage on the Broadway property. When defendant ascertained that said mortgages were existing liens upon said land, he requested plaintiff to pay off said mortgages, or have them released in some manner, so that they would not be liens on the defendant's land, plaintiff repeatedly promised to have said mortgages released, but has ever since failed to do so, and they still exist as liens of record on said land.

And for a third, separate and distinct defense to the claim of the plaintiff herein, this defendant repeating all the statements hereinbefore set forth, alleges:

X. That prior to the commencement of this action he has conveyed said Iowa land to his codefendant Edward Phelan. That prior to said conveyance he had borrowed from said Phelan certain moneys and gave him a deed to said lands as security for the money borrowed. That thereafter and on or about the 15th day of September, 1892, he sold said lands absolutely to the said Phelan, and who paid therefor by assuming and agreeing to pay certain debts then due and owing from this defendant to the defendant Edward R. Duffie, and to one E. P. Savage, a resident of South Omaha, Nebraska, and by giving his evidence of indebtedness for any balance of the purchase price, and he alleges the fact to be
105 that the said Phelan is now the absolute owner of all of said liens, and this defendant has no interest therein.

For a fourth separate and distinct defense to the claim of the plaintiff herein, this defendant repeating all the statements and allegations hereinbefore set forth, alleges upon information and belief:

XI. That prior to the commencement of this action, and on or about the 22d day of September, 1892, the said Daniel Dull duly executed, acknowledged and delivered to one Nellie M. Dull a certain instrument in writing which purported to convey to her the premises in Pottawattamie county, Iowa, heretofore conveyed by him to this defendant, which instrument was, as this defendant is informed and verily believes, duly recorded in the office of the recorder of said Pottawattamie county, on the 26th day of September, 1892; this defendant therefore alleges that the claim or cause of action, if any, which existed in favor of the plaintiff herein against this defendant, for the annulling of said deed from Daniel Dull to John E. Blackman, which conveyed said premises accrued

to the said Nellie M. Dull by virtue of the said conveyance dated September 22d, 1892, and that the plaintiff herein is not the real party in interest, and is not entitled to maintain this action.

Wherefore the defendant John E. Blackman asks judgment *diminishing* the complaint, besides the costs and disbursements of this action.

J. ALBERT LANE,
Attorney for Defendant John E. Blackman.

Office and post-office address, 35 Wall street, New York city.

CITY AND COUNTY OF NEW YORK, *ss:*

106 John E. Blackman, being duly sworn, says that he is the defendant above named; that he has read the foregoing amended answer; that the same is true to his own knowledge, except as to the statements therein alleged to be made on information and belief, and that as to those statements he believes it to be true.

JOHN E. BLACKMAN.

Sworn to before me this 13th day of January, 1893.

RICHARD I. TREACY,
Notary Public, New York County.

Supreme Court, Westchester County.

DANIEL DULL, Plaintiff, *against* JOHN E. BLACKMAN, MARY E. BLACKMAN, George F. Wright, Asa W. Askwith (Asa Being Fictitious, Christian Name Unknown), Edward Phelan, Edward R. Duffie, Defendants.	Injunction by Order.

It appearing satisfactory to me, by the complaint herein, and the affidavit of Daniel Dull, that sufficient grounds for an order of injunction exist upon the grounds that the plaintiff is the true owner of certain lands in Pottawattamie county, Iowa, described as follows, viz: The south half (S. $\frac{1}{2}$) of section numbered four (4); the northeast quarter (N. E. $\frac{1}{4}$) of section numbered nine (9); the northeast quarter of the southeast quarter (N. E. $\frac{1}{4}$, S. E. $\frac{1}{4}$) of section numbered nine (9), and thirty-one and $\frac{6}{100}$ acres out of the southeast quarter of the northeast quarter (S. E. $\frac{1}{4}$, N. E. $\frac{1}{4}$) of section numbered nine (9) all in township seventy-six (76) north of range forty-two (42) west of the 5th principal meridian; that the defend-

107 ant John E. Blackman by fraud obtained from said Dull a deed conveying said lands to said Blackman; that said Blackman is making conveyances thereof, and is encumbering the same; and has instituted a suit in the district court of Pottawattamie county, Iowa, against said Daniel Dull and Nellie M. Dull,

his wife, for the purpose of obtaining a judgment against them that they have no title to or claim upon said lands—

I do hereby order, that the defendant John E. Blackman refrain from conveying or encumbering said lands or any part thereof, and from further prosecuting against said Daniel Dull and Nellie M. Dull said suit in the district court of Pottawattamie county, Iowa, or permitting the same to be prosecuted, and from commencing or prosecuting any other action affecting the title of said Daniel Dull and Nellie M. Dull to said lands until the further order of this court, and in case of disobedience to this order, you will be liable to the punishment therefor prescribed by law.

Dated Nov. 9, 1892.

EDGAR M. CULLEN,
Judge Supreme Court.

Supreme Court, Westchester County.

DANIEL DULL, Plaintiff, *against* JOHN E. BLACKMAN, MARY E. BLACKMAN, GEORGE F. WRIGHT, ASA W. ASKWITH (Asa Being Fictitious, Christian Name Unknown), EDWARD PHELAN, EDWARD R. DUFFIE, Defendants.	Order of Publication.

It appearing to my satisfaction by the summons and by the complaint in this action, duly verified the 3rd day of November,
108 1892, showing a sufficient cause of action against the abovenamed defendants, and due proof by the affidavit- of Daniel Dull, the plaintiff, and Michael D. Griffin, verified December 7th and 9th, 1892, and the certificate of the sheriff of the county of Westchester, duly presented to me and filed herewith, upon which said complaint, affidavits and certificate this order is founded, that the defendants George F. Wright, Asa W. Askwith, Edward Phelan, and Edward R. Duffie are not nor either of them residents of the State of New York, but that defendants George F. Wright and Asa W. Askwith reside in the city of Council Bluffs in the State of Iowa, and defendants Edward Phelan and Edward R. Duffie reside in the city of Omaha in the State of Nebraska, and that the plaintiff has been and will be unable, with due diligence, to make personal service of the summons upon said defendants or either of them within this State, and that a cause of action exists in favor of plaintiff against the defendants for an injunction perpetual, as set forth in the complaint herein.

Now on motion of Martin J. Keogh, plaintiff's attorney,

Ordered, that the service of the summons herein upon the defendants George F. Wright, Asa W. Askwith, Edward Phelan and Edward R. Duffie be made by publication thereof in the Eastern State Journal, and in the New Rochelle Paragraph, two newspapers published in the county of Westchester, as most likely to give notice to said defendants and each of them, not less than once a week for six successive weeks, or at the option of the plaintiff by service of

the summons, and a copy of the complaint and of this order without the State upon the defendants George F. Wright, Asa W. Askwith, Edward Phelan and Edward Duffie personally, said defendants and each of them being of full age.

109 It is further ordered, that on or before the day of the first publication, the plaintiff deposit in the general post-office of the city of New York one set of copies of the summons, complaint and of this order contained in securely postpaid wrappers, directed to each of said defendants as follows: George F. Wright, Esq., Council Bluffs, Iowa; A. W. Askwith, Esq., Council Bluffs, Iowa; Edward Phelan, Esq., Omaha, Nebraska; Edward R. Duffie, Esq., Omaha, Nebraska.

Supreme Court, Westchester County.

DANIEL DULL, Plaintiff,
against
JOHN E. BLACKMAN, MARY E. BLACKMAN, GEORGE F. Wright, Asa W. Askwith (Asa Being Fictitious, Christian Name Unknown), Edward Phelan, Edward R. Duffie, Defendants.
} Findings.

In this action tried before the court at special term at the courthouse in the village of White Plains, Westchester county, in April and May, 1893, I do make and find the following findings of facts and conclusions of law, and decide as follows:

Findings of Fact.

First. That on the 25th day of June, 1889, the plaintiff Daniel Dull was the owner in fee-simple of certain lands in the county of Pottawattamie and State of Iowa, described as follows, namely:

The south half ($\frac{1}{2}$) of section numbered four (4), the north-
110 east quarter (N. E. $\frac{1}{4}$) of section numbered nine (9), the northeast quarter of the southeast quarter (N. E. $\frac{1}{4}$, S. E. $\frac{1}{4}$) of section numbered nine (9), and thirty-one and $\frac{6}{10}$ acres out of the southeast quarter of the southeast quarter (S. E. $\frac{1}{4}$, S. E. $\frac{1}{4}$) of section numbered nine (9), being the part of said last-mentioned forty-acre tract heretofore conveyed to Daniel Dull by George F. Wright; all in township seventy-six (76) north of range forty-two (42), west of the 5th P. M., in all 551.06 acres.

Second. That on or about said 25th day of June, 1889, the plaintiff conveyed said lands to the defendant John E. Blackman by a deed duly executed and acknowledged, and containing full covenants of warranty.

Third. That on said 25th day of June, 1889, and prior thereto, the plaintiff was in the possession and occupation of a parcel of land situate at the southeast corner of Broadway and Fifty-first street, in the city of New York, having a frontage of about forty feet on Broadway and extending back on Fifty-first street about thirty feet. Plaintiff held possession of said property and of the remainder

of the lot, running east as far as Seventh avenue, under a lease for a term of years from one Amos M. Lyon, and had erected upon the entire lot a brick building four stories in height, the front of which faced upon Broadway. Said building cost about forty thousand dollars.

Fourth. Prior to said 25th day of June, 1889, the defendant John E. Blackman, for the purpose of inducing the plaintiff to execute and deliver the deed referred to in the second finding of fact, represented to the plaintiff that plaintiff's landlord had no title to the part of said lot fronting on Broadway and extending back about thirty feet on Fifty-first street. Said Blackman stated and
111 represented to plaintiff that he, Blackman, owned more than eighty per cent. of the title to that portion of the lot, which title he had obtained from some of the heirs of one John Hopper, who formerly owned it. Said Blackman further stated to said Dull that he had made arrangements to acquire the title of all the other heirs of said Hopper, except a few who could not be traced, and whose interest did not amount to more than five per cent. of the entire title. Said Blackman knew when he made said statements and representations to said Dull that they were false and untrue, and he made said statements for the purpose of procuring the deed aforesaid.

Fifth. That plaintiff believed and relied upon the statements and representations of the defendant Blackman as to the amount of percentage of the Hopper title which said Blackman had acquired, and had arranged to acquire.

Sixth. Said Blackman at the same time stated to plaintiff that he, Blackman, was the possessor of ample funds, and of property which could be converted into money, wherewith to prosecute his claim to the ownership and possession of the Broadway end of said lot, and that he intended to forthwith prosecute a suit against the plaintiff, and plaintiff's landlord, to obtain possession thereof. Said Blackman knew when he made said statements and representations to said Dull, that they were false, and untrue, and he made said statements for the purpose of procuring the deed aforesaid.

Seventh. The plaintiff believed and relied upon said Blackman's statement that he was financially able to prosecute his said claim of ownership by legal proceedings.

Eighth. Plaintiff, relying on the truth of said statements and representations, agreed with the defendant John E. Blackman,
112 that the plaintiff should execute and deliver to said Blackman the deed conveying said Iowa lands; that said Blackman should execute a deed conveying to the plaintiff the said parcel of land at the southeast corner of Broadway and Fifty-first street, in the city of New York; that said last-mentioned deed should be placed in the hands of some suitable person to abide the event of the suit which Blackman was about to commence to obtain possession of the property therein described; that said Blackman should promptly commence and prosecute his said action, to final judgment, at his own expense; that if said judgment sustained and supported the claim of said Blackman, the last-mentioned deed

was to be delivered by the party having the custody thereof to the plaintiff; and that if said judgment was against the validity of said claim, said deed was to be redelivered to said Blackman.

Ninth. Said Blackman accordingly, executed a deed conveying said parcel of land at Broadway and Fifty-first street to the plaintiff, and the same was placed in the hands of one Alfred King, to be held by him upon the terms above set forth.

Tenth. The defendant John E. Blackman at the time of making his representations to the plaintiff, and at the time of obtaining from plaintiff the deed conveying said Iowa lands, had not obtained from the heirs of John Hopper, or from any person, conveyances representing more than fifty-four per cent. of the Hopper title to the parcel of land occupied by the plaintiff and hereinbefore described; and he had not made arrangements to obtain all of said Hopper title, except about five per cent. thereof; and he was not the possessor of funds, nor of property convertable into money, wherewith to prosecute his claim to said parcel or land, and he was aware of all of said facts at the time he made his statements and representations to the plaintiff, and obtained from the plaintiff the deed conveying the lands in the State of Iowa.

113 Eleventh. That prior to the commencement of this action the defendant John E. Blackman had begun an action in the district court of Pottawattamie county, Iowa, against the plaintiff in this action and Nellie M. Dull, his wife, to obtain judgment against the plaintiff herein and said Nellie M. Dull, that he, the said Daniel Dull, has no interest in said lands in Iowa, and to quiet and establish the title of John E. Blackman thereto. Said action is still pending in said district court of Pottawattamie county, Iowa.

Twelfth. In the month of October, 1889, the defendant John E. Blackman sold and conveyed all his claim and interest in the parcel of land at the southeast corner of Broadway and Fifty-first street in the city of New York, to Amos M. Lyon, the landlord of the plaintiff. Said Blackman has never paid the plaintiff any money for said Iowa lands, and has not reconveyed the same to plaintiff, but has executed various conveyances and mortgages thereupon, for the purpose of raising money, and has thereby greatly complicated and beclouded the title thereto.

Thirteenth. A preliminary injunction as prayed for in the complaint, was granted herein November 9, 1892, which was personally served on defendant Blackman on the 15th day of November, 1892, which injunction has never been vacated, modified or set aside.

As conclusions of law I find

I. That the deed from the plaintiff to the defendant John E. Blackman, dated the 25th day of June, 1889, conveying to said defendant the lands described in the fourth paragraph of the complaint herein, is void, and of no force or effect whatever.

114 II. That the plaintiff is entitled to a reconveyance of said lands from the said defendant John E. Blackman, in the form prayed for in the complaint herein, and executed in accordance with the laws of Iowa, and so as to be entitled to be recorded in Pottawattamie county, Iowa.

III. That the plaintiff in entitled to judgment perpetually enjoining and restraining the defendant John E. Blackman from further prosecuting said suit in the district court of Pottawattamie county, Iowa, and from permitting the same to be prosecuted as against the plaintiff herein or Nellie M. Dull, the plaintiff's wife, and from aiding and abetting, and from rendering any assistance to the defendant Phelan or any other person, in making or prosecuting any claim to said Iowa lands, against said Daniel Dull and Nellie M. Dull, based upon any title claimed to be derived from said defendant John E. Blackman as grantee in the deed hereby declared void.

And I direct that judgment be rendered accordingly, with costs to the plaintiff.

J. O. DYKMAN,
Judge Supreme Court.

At a special term of the supreme court, Westchester county, held at the court-house, in the village of White Plains, this 20th day of May, 1893.

Present: Hon. Jackson O. Dykman, justice.

DANIEL DULL, Plaintiff,
against
JOHN E. BLACKMAN, MARY E. BLACKMAN, GEORGE F. Wright, Asa W. Askwith (Asa Being Fictitious, Christian Name Unknown), Edward Phelan, Edward R. Duffie, Defendants. } Decree.

115 This action coming on to be heard at a special term of this court at the court-house, in the village of White Plains, before Hon. Jackson O. Dykman, on the — and — days of April and the 6th and 16th days of May, 1893, and the court having made and filed its findings of fact, and its conclusions of law and its decision in favor of the plaintiff and against the defendants, which entitles the plaintiff to this judgment and decree, whereby the court found among other things, that the plaintiff on the 25th day of June, 1889, was the owner in fee-simple of certain lands in Pottawattamie county, Iowa, hereinbefore described, which said lands plaintiff deeded to the defendant John E. Blackman, relying upon certain statements and representations made by said Blackman to plaintiff, which said statements and representations were false, and known by the defendant Blackman to be false and untrue, and which were made with intent to deceive plaintiff, and that plaintiff, relying upon the truth of said statements and representations, made said deed of said land in Pottawattamie county, Iowa, to said defendant Blackman, believing said statements and representations to be true.

The court having further found that after receiving said deed, said defendant Blackman commenced an action in the district court of Pottawattamie county, Iowa, against this plaintiff, Daniel Dull, and Nellie M. Dull, his wife, claiming to be the absolute owner of

said lands, and asking that the said plaintiff and his wife be declared to have no claim or interest therein, and that all the defendants in this action were also parties to said action in the Iowa court, and became interested in said litigation by virtue of certain conveyances made by said Blackman and his grantees, and the court having granted herein a preliminary injunction on the 9th day of November, 1892, enjoining and restraining the defendant John E.
116 Blackman from conveying or encumbering said lands, or any part thereof, and from further prosecuting against said Daniel Dull and Nellie M. Dull, said suit in the district court of Pottawattamie county, Iowa, or permitting the same to be prosecuted, and from commencing or prosecuting any other action affecting the title of said Daniel Dull and Nellie M. Dull to said lands, which said injunction was served upon the defendant Blackman personally on the 15th day of November, 1892, in the city and county of New York, which said preliminary injunction has never been vacated or set aside.

Now, on motion of Martin J. Keogh, attorney for plaintiff Daniel Dull, it is

Adjudged and decreed that the deed of the lands hereinbefore described, situate in Pottawattamie county, Iowa, made by the plaintiff Daniel Dull to the defendant John E. Blackman, which said deed bears date the 25th day of June, 1889, be and the same hereby is declared and adjudged to be void, and of no force or effect whatever, and said defendant John E. Blackman be and hereby is ordered and directed to execute to the plaintiff Daniel Dull a good and sufficient deed, conveying to the plaintiff said lands hereinbefore described, which deed shall recite the findings and decision of this court.

It is further ordered, adjudged and decreed, that the defendant John E. Blackman be and he hereby is, and the defendant Mary E. Blackman, George F. Wright, Asa W. Askwith (Asa being fictitious, Christian name unknown), Edward Phelan, Edward R. Duffie, be and each of them is hereby *is*, perpetually enjoined and forever restrained from prosecuting a certain action in the district court of Pottawattamie county, Iowa, affecting the title to said lands
117 against this plaintiff, Daniel Dull and his wife, Nellie M. Dull, or either of them, and from executing any further or other conveyances of said lands, or encumbering the same in any way. The lands hereby directed to be so conveyed by said defendant John E. Blackman to the plaintiff Daniel Dull, are situate in Pottawattamie county, Iowa, and particularly described as follows, to wit:

The south half (S. $\frac{1}{2}$) of section numbered four (4), the northeast quarter (N. E. $\frac{1}{4}$) of section numbered nine (9), the northeast quarter of the southeast quarter (N. E. $\frac{1}{4}$, S. E. $\frac{1}{4}$) of section numbered nine (9), and thirty-one and $\frac{6}{10}$ acres out of the southeast quarter of the southeast quarter (S. E. $\frac{1}{4}$, S. E. $\frac{1}{4}$) of section numbered nine (9), (being the same part of said last-mentioned forty-acre tract heretofore conveyed to Daniel Dull by George F. Wright), all in township

seventy-six (76) north of range forty-two (42), west of the 5th P. M., in all $551\frac{5}{100}$ acres.

It is further adjudged and decreed, that the plaintiff recover his costs and disbursements in this action, as taxed at $—, and have execution therefor.

J. O. DYKMAN,
Judge Supreme Court.

All which we have caused by these presents to be exemplified, and the seal of our supreme court to be hereunto affixed.

Witness, Hon. J. F. Barnard, justice, at White Plains, the 24th day of May, in the year of our Lord one thousand eight hundred and ninety-three.

J. M. DIGNEY, *Clerk.*

I, J. F. Barnard, presiding justice of the supreme court of
118 the State of New York, for the county of Westchester, do hereby certify that John M. Digney, whose name is subscribed to the preceding exemplification, is the clerk of said county of Westchester, and clerk of said supreme court for said county duly elected and sworn, and that full faith and credit are due to his official acts. I further certify, that the seal affixed to the exemplification is the seal of our said supreme court, and that the attestation thereof is in due form.

Dated White Plains, May 24th, 1893.

J. F. BARNARD.

STATE OF NEW YORK, } ss:
County of Westchester, }

—John M. Digney, clerk of the supreme court of said State, in and for the county of Westchester, do hereby certify that J. F. Barnard, whose name is subscribed to the preceding certificate, is presiding justice of the supreme court of said State in and for the county of Westchester, duly elected and sworn, and that the signature of said justice to said certificate is genuine.

In witness whereof, I have hereunto set my hand and affixed the seal of said court this 24th day of May, 1893.

J. M. DIGNEY, *Clerk.*

L. P. JACOBSON.

Farmer, Pottawattamie county, Iowa. My land corners with the property in controversy. For the years 1890, 1891 and 1892, the average rental value of the property in controversy was three dollars an acre. There is a half section in grass and a stream running through it. The market value of the land at the present time is $40 per acre, and was the same value in August, 1889.

119 Cross-examination:

About 200 acres of the land is improved and fenced. The land has been worth $40 an acre since 1889.

Redirect:

My farm joins the land in controversy—120 acres, partially improved and partially grass land. I sold it for $45 an acre this spring. Some improvements on it were twelve or thirteen years old. The land in controversy has a house and buildings on it, and a stable, and is all fenced.

T. W. CASTOR.

Farmer. Live near the land in controversy. Am acquainted with it, and the rental value of land for the last three years. The average rental value, for the last three years, of the land in controversy, is $3.00 per acre per year. There are two houses on the land. The land is worth fully $40 an acre at the present time; in 1889, about $37.50 per acre.

Cross-examination:

The houses on the land are not first class—about 16 by 23 feet, and one-story. They add considerable to the value, and there is a little barn on the place. The barn is a pretty good one, but has been let go to rack; it is not in good shape.

Stipulation.

It is agreed that all the evidence offered by the parties, both affirmative and defensive, may be considered on the cross-petition of the defendant Dull, and that the evidence introduced by Mr. Dull, as to the rental value, may be considered as Mr. Phelan's evidence.

120 JOHN E. BLACKMAN.

I am the original plaintiff in this case, and the principal defendant in the suit in Westchester county, New York, entitled Dull *vs.* Blackman, *et al.*, and I appeared in that case by council, and contested the action on its merits.

(Witness is called upon to produce telegrams of George F. Wright, which are identified and offered in evidence, as follows:)

"EXHIBIT T."

"COUNCIL BLUFFS, IOWA, *Nov.* 21, 1891.

To Charles Haldane, Pulitzer bldg., New York:

John willing; balance land over my five thousand shall go for the New York enterprise. What is your plan? How am I to get five thousand? On receipt thereof will deed land. I can get rid of your Wright addition lots, and save you from further payment on the same. Send deed immediately, and wire when you have done so. Answer quick.

GEO. F. WRIGHT."

"EXHIBIT U."

"COUNCIL BLUFFS, IOWA, *Nov.* 25, 1891.

C. Haldane, New York:

Deed to Blackman sent Chemical bank yesterday. Will wire you hundred tomorrow forenoon.

GEO. F. WRIGHT."

"EXHIBIT V."

"COUNCIL BLUFFS, IOWA, *Dec.* 7, 1891.

C. Haldane, Pulitzer bldg., New York:

Geise surrenders his contract. Forwarded same with
121 Blackman deed to him Chemical bank, with instructions to deliver my deed Blackman, payment to Pusey's credit, $5,000.

GEO. F. WRIGHT."

I got these telegrams from Mr. Haldane, as having been received from Mr. Wright. The deed referred to in the telegram was the deed from George F. Wright to me of the land in controversy.

I never received any money from Mr. Wright at all. Mr. Haldane knew about my quitclaiming the property on Broadway to Mr. Lyon. The conveyance to Lyon was made after I had deeded the Iowa property to Wright. Haldane got $10,000 from Lyon for the deed. It was in checks, payable to my order, and I endorsed them over to Haldane. Mr. Haldane has received on the New York enterprise ten thousand dollars from Lyon, and five thousand from McCrae. Haldane owes me between fourteen and fifteen thousand dollars, in round numbers. We have had a settlement, and a schedule is attached to the back of our contract.

(Witness produces contract between him and Haldane, dated May 19, 1892.)

This is the only contract now in force. There was a prior contract, which Mr. Haldane had. The larger portion of the money Mr. Haldane received was used by him for his own private expenses. They always looked enormous to me. Haldane was living pretty high, part of the time, as long as he could get money. He was using all the money he could get for his own private expenses. Mr. Baldwin was in New York several times during the summer of
1889, and Judge Hubbard was also there, in reference to the
122 matter, *i. e.*, the Hopper affair. My offer to Mr. Dull was, to give him my claim against the portion of the lot that belonged to Mr. Lyon. After this conveyance I talked with Mr. Wright, in 1890, and asked him to reconvey the property to me. He wanted four or five thousand dollars before doing it. Since then I have seen him repeatedly, in 1891 and 1892. It seems to me there was some correspondence; I know I talked to Haldane a good many times about it. Haldane agreed to get it back for me, and I de

pended on him up to the time he and I came out here, in October. Mr. Haldane was my agent to get a reconveyance from Wright. I deeded it on his recommendation, and when I didn't get what I expected I was getting, I asked him to get it back, and I figured I would charge him up with the land if I didn't get it. This was immediately after the failure of consideration between myself and Mr. Dull.

Cross-examination:

The reason I deeded the land to Mr. Lyon was the failure on Dull's part to release a mortgage on the land deeded to me. I told Mr. Dull, two or three days before I made the deal, "If you don't release the mortgage so I can handle the land, I will settle with Lyon on my own account, and you can take your land; I have got to have money." Dull said he would do everything he could to release it, but he didn't have the money and didn't know where he could get it. His intention was to have Holcomb release it, and that there was security enough in the balance of the land.

Cross-examination by Mr. BALDWIN:

Mr. Dull knew I had conveyed his land to Mr. Wright. While I was negotiating the settlement with Lyon, part of the
123 time I was acting for Dull, until I told Dull I would settle on my own account.

Redirect:

I have with me the deeds from me to Savage and from Savage to me. At the time I wrote the letter, offering to reconvey the land to Dull, the legal title was in Mr. Wright. I had only the equitable title.

Defendant Dull offers in evidence warranty deed of John E. Blackman and wife to Ezra P. Savage for $15,000, dated October 1, 1889, conveying the property in controversy. Filed September 29, 1890.

Also deed of Ezra P. Savage to John E. Blackman, quitclaiming the property in controversy, dated January 1st, 189[illegible], and acknowledged March 3, 1891, and recorded in Pottawattamie county, Iowa, on the same date, viz., March 30, 1892.

The defendant Dull moves to strike from the record all the testimony of the witness Blackman on cross-examination of Mr. Baldwin and Mr. Duffie, as to conversations with Lyon and Dull; and in reference to negotiations for the purchase of the Broadway interest, as incompetent and immaterial, not proper cross-examination, and for the reason that it is an attempt on the part of the witness Blackman, and of the intervenor Phelan, and defendant Wright, to contradict the express special findings and decree of the supreme court of Westchester county, New York, heretofore offered in evidence.

testified as set out on pages 83-'4-'5-'6-'7-'8-'9-90, *ante*, and in addition thereto, as follows:

I bought 1,384 acres of land in Pottawattamie county, Iowa, of George F. Wright, in 1883, and paid him $23 per acre. I am acquainted with Charles Haldane and John E. Blackman. In May, 1889, they left a card of Wright, Baldwin & Haldane at my office, with Mr. Haldane's name marked, and their downtown address, corner Warren street. The fact that I was acquainted with Mr. Wright, made it a matter of curiosity to me as to what they wanted, and a day or two afterward I called at their office. They made a statement to me in regard to their business; that they represented the Hopper title to the old Bloomingdale road, and they had deeds and were there to represent their interest and affairs, either amicably or by litigation. They said the firm of Wright, Baldwin & Haldane, of which Mr. Wright was a member, was in the deal. At that time I had a lease of a lot running from Broadway to Seventh avenue, along Fifty-first street, a distance of 156 feet, average width 48 feet. Had leased the land for twenty years, and put up a building on it. The Broadway frontage, in dispute, was 41 by 24 feet. They said I was on the disputed ground, and wanted to see me about asserting their title. They supposed I was the owner. For some time afterward we had negotiations, which resulted in me giving them 551 acres of Iowa land for the title to this property in dispute. I executed a deed and Blackman executed a deed to me, which was finally put in Charles Haldane's hands in escrow.

Q. *What, if any, consideration did you ever receive for the conveyance of your Iowa land?*

125 A. *None whatever.*

Q. *To whom was the land conveyed that you were to receive for your Iowa deed by Blackman and Haldane?*

A. *To Mr. Lyon, my landlord.*

This conveyance was made at the time they had agreed and were still agreeing to convey the property to me, and before they had fulfilled their contract, so far as asserting the title was concerned, and delivering to me the property. The Broadway front was conveyed to Lyon, without my knowledge or consent. Haldane knew all about it at the time, and was the first to tell me. About a year or two ago, I had a conversation with Mr. Wright in Council Bluffs; he claimed to have advanced $5,000 to Haldane, for which he was holding the land as security. I had been informed by Blackman and Haldane that they had conveyed the land to Wright for $10,000, to be advanced to them as they might see fit to call for it. They had always told me that they had never received any money at that time or since. *At the time Blackman offered to reconvey the land to me, he had no title to the property.* When I found they had conveyed the property away from under me, I found Haldane, and he wouldn't talk to me, but said Blackman was in the recorder's office, and would tell me what had been done. We went to the office, and I found Blackman there, and each tried to force the other to tell what had been done. Finally Blackman blurted out, "*I have done it*"—*meaning that he had done me up.*

Haldane said he had advised Blackman to do this, but gave no reason for it.

In accordance with Mr. Blackman's letter, I met him and Duffie at the Palmer house, Chicago, in February, 1892. At that interview Blackman said there never had been a time since he
126 committed the act that he didn't regret it, and that he had always intended to make it good. That he was thankful to me, for the time he was imprisoned in Albany, for a similar offense, that I hadn't filled the newspapers with trash in regard to his conduct to me; and that he was ready now to settle with me, and make satisfaction. I asked him what he considered his duty to be towards me, and he said *it was to return to me my land in the condition he found it, and to make me good for all expenses, costs, etc.* Judge Duffie was present at this conversation. *They occupied the same rooms together.* Duffie said that Blackman was trying to persuade him to come to New York and become interested in the matter there in the place of Haldane as attorney; that he would not consent to do so, or have anything to do with any claim upon which there was such a cloud, and that Blackman must settle with me and make entire satisfaction before he would even consider the proposition. *He characterized the New York transaction,* in which Blackman had conveyed the property to Lyon, as "*High swindling.*" *He said it was "high swindling." He knew all about the fact that I had received no consideration for the Iowa land. It was all talked over in a general way.* I don't know whether he was representing Blackman, or himself, at that time, but *think, now, that he was representing himself.*

He didn't tell me — had a $5,500 mortgage on the land, nor that Blackman had conveyed the land to Phelan or Savage; neither did I know anything about it. Mr. Burdick was present during all these conversations. *There was no settlement of any kind effected between me and Mr. Blackman at that time. He didn't make any proposition of settlement further than to return to me my land. He wanted me to act in unison with him in defeating Wright's claim, and then*
127 *he would redeed the land to me, and he agreed to make conveyance immediately on getting the title.*

Mr. Blackman came back with me to New York on the same train. On my return Mr. Blackman represented to me that he owned 25 per cent. of the New York enterprise, and proposed to turn over to me, or sell to me, a certain portion of it to assist him in expenses in carrying on his matter, and about two weeks after we left Chicago we came to some sort of an understanding. But *the result of the whole thing was, there was no settlement ever made. The arrangements and agreements were never fulfilled. He succeeded in getting money from me on these proposed agreements, but I found out that Mr. Blackman's representations were untrue in regard to his interests, and all arrangements were broken off.*

When I saw Wright, a year or two ago, I fully explained to him about the transactions between Blackman and myself, and he fully understood I had received no consideration for this conveyance.

I tried to get my land back, and told him that if he would settle the matter, and turn in and assist me in my rights, that I would

allow him to hold the rents he had already received, and that if I should ever get anything out of the New York deal, that I would allow him dollar for dollar that I received until he had money enough to cover his claim. Wright virtually accepted this proposition, and I supposed the matter was settled when I left Council Bluffs. But he wanted to see Baldwin, who was on his way to Boston, and he reserved the right to speak to Baldwin, as a matter of form, before making the agreement absolute, and agreed to write me as soon as he had seen Baldwin. Afterward, in a letter
128 to Haldane, he refused to carry out the agreement, but claimed he wanted his money back, about $5,000.

Cross-examination:

The only portion of the land I had a lease upon, that was controverted, was 41 feet on Broadway, and 24 feet on Fifty-first street. *The deed was placed in escrow*, and the mortgage was placed in my hands, and *there was an understanding that it should not be placed on record.* My lease had a clause in it that at the end of ten years it might be taken in for $22,000, with a percentage off. I was paying $4,000 yearly, land rent. If I could have got this strip it would have improved my condition there.

And that was entirely my business with Blackman and Haldane, to obtain it. *I held the mortgage* on the Broadway strip from Blackman, *under an agreement between us.* I told my landlord I had it in my power to settle the whole business; told him I was in a position to settle the claim, and I thought that was all right. And *while I was having these negotiations with Lyon, Blackman sold out to him without my knowledge, and received $10,000 from him for the conveyance.* I didn't consider I was under any obligation to tell Lyon about the conveyances that had been executed on the strip. I didn't have any conversations with Wright in regard to the transaction, because I looked upon him as one of the parties to it. I might have placed the mortgage of record, but *it would have been in violation of my agreement with Haldane and Blackman. I was not to place it on record only for my protection against bad faith of Haldane and Blackman. The mortgage was merely a guaranty, a protection against bad faith—and only to protect myself against their bad faith, had I a*
129 *right to put it on record.*

Q. *But you didn't see any bad faith?*

A. *No, sir; it came so suddenly, I hadn't time; that is what all that means.*

I knew when I went to Chicago that Blackman had practised a fraud on me, but went there to arrange for a settlement. *We made none in Chicago*, but went back to New York together. There was sort of a memorandum of an agreement made as to a portion of the Broadway strip, and I paid him some money under an arrangement—pending an arrangement and signing of a contract. I don't know whether I have any security from Mr. Haldane, or not, for advancements made to him. *I have been bumped around in this thing until I don't know just where I am.* I never made any representa-

tions to Mr. Lyon as to who had the title to the strip. I was negotiating with him to sell the title, an intermediary, as it were. It is pretty hard to tell what one's office is, when you are doing business with that kind of people. My negotiations were to sell out the building and the piece of land with it. The value of the strip was put in at $10,000. What I wanted to get was the cost of my building, which had cost me $45,000, and I offered him the building at $35,000. I tried very hard to settle with him for that. Mr. Burdick, a friend of mine, from Chicago, was boarding at the Palmer house, at Chicago, at the time of my meeting with Blackman.

Q. *Do you swear that Judge Duffie said this transaction was high swindling?*

A. *I do, sir; absolutely.*

Duffie knew all about the matter, and Blackman's side of the case. He seemed to be very familiar with it. Duffie said nothing to
130 me about having a mortgage, while in Chicago. I said he was there in his own interest, and *based my opinion on the condition of the deal since then.* I never asked Duffie at that time, if I could enforce my mortgage on the Lyon property, neither did I ask or seek his advice, nor did I ask him the effect of the quitclaim deed, nor how I could protect my interests under the mortgage on the New York strip. *I swear, positively, I didn't talk to him at all about that, nor did I ever talk about employing him to come and help me enforce it. I never told Duffie, before he left Chicago, that Blackman and I had made a settlement or an understanding, or that we would fix the matter up in New York—not one word of truth in the whole business. I didn't tell Judge Duffie anything of the kind, because it was not true.* I asked Judge Duffie what he thought of Blackman's conduct, on the lower floor of the Palmer house, near the elevator, and his answer to my question was, that "*it was high swindling.*"

Duffie came into the room where Blackman and I were, and volunteered the opinion that as my landlord had taken a quitclaim deed his title would not be good only as against Blackman's interest, and he thought it should be set aside, and that he would voluntarily go to New York and attempt to set it aside and take nothing for his pay unless he succeeded. That was the end of the conversation, so far as I know. *I didn't ask him for any opinion,* nor did I make him any offer to go to New York. *Blackman and I had this talk, that he was to restore to me my Iowa land; that I should act in unison with him. He had already brought suit against Mr. Wright, as stated.* I knew nothing of the other claims. *He wanted me to work in unison with him, and as soon as the deed was cancelled to Wright he would restore the land to me, redeed it and make me good for all damages I had been to through his dealings.*

131 *Afterwards,* he said he was hard up, and said something about money matters, and wanted me to take some interest in the New York enterprise, and wanted me to advance some money to assist him in carrying along the enterprise in this other matter. But that was all—that was as far as that went. Blackman has got two or three thousand dollars in money out of me since the Chicago meeting but *it was under no definite arrangement or agreement.*

The only understanding when we left Chicago was, that we were to act in unison as against Wright, in obtaining back my Iowa land. I was willing to do what I could to get back my land. That was my sole object. I supposed Blackman was a good enough man to work with, like that, but I *didn't find it that way; I thought that was the best method to get possession of my land. I went back to New York with him, but never made any contract with him.* We had some verbal understandings, but they were not based upon any facts. In the matter of unison against Wright, so far as I was concerned, it didn't represent very much, there was very little for me to do. *I took this method of getting possession of my land.*

Redirect:

My explanation of the arrangement with my landlord is simply this: There was a party started a building, and failed; I made arrangements to buy out the creditors; met at the landlord's to settle the matter, and there was a clause in the lease they had, that I objected to, and which these people promised to remove, and that was to take the property in at the end of ten or fifteen years. The landlord was a very peculiar man—a good deal of a crank, and
132 was having trouble with his wife about a separation, and she was in the office to sign this lease, and he was very obstinate, and when we came to that point of removing that clause he could not be handled. His attorney could not approach him; he was ugly—very much worried, and rather than have the whole matter break up, which we had been weeks in getting together, his attorney said to me: "Mr. Dull, my landlord, wants this property earning money; he don't care anything about this clause; you see he is cranky and fretful, and we can do nothing with him today. Now, it is either to get together or break it up today, and I will give you my word, as his attorney, that if you will sign this lease in this way, it shall never be taken advantage of." The result was, I signed the lease finally. I had an estimate of what the building would cost, which was about $20,000 to $25,000, and it was put in the lease that the amount should be $22,000, that he was to pay for it, and that gave him the privilege, in ten or fifteen years of taking in the building, provided he didn't honor his attorney's guaranty. The building cost me more than $40,000. The amount of money in the building was an inducement to my landlord to not comply with what I desired. I wanted him to take the clause out, as agreed, or buy the building, which I offered him for $35,000, which is probably $7,000 less than it cost, or give me some evidence that he would not trouble me at the end of ten or fifteen years. He wouldn't do it, and before I closed the deal with Blackman I did everything I could to persuade him to do as I wanted. I closed the deal with Blackman, believing I would be able to turn over this land and the building to my landlord and then get my money out. *It was suggested by Haldane and Blackman* that I might operate as a medium and assist in the settlement, and I did more or less in representing their claim to my landlord in the way of persuading him to buy
133 and take the whole business off my hands and leave me out. I didn't attempt to sell the strip, it was the whole business—

building and land. I closed the deal with Blackman, with the understanding that the matter should not be made public on account of my position, and the mortgage was not to be put on record, but was given as evidence of good faith.

I agreed to deliver the Iowa land to Mr. Blackman, free of encumbrance. *He was informed in the beginning all about the mortgage.* When they got into trouble with Wright, it proved to me Blackman had no money. He represented he had $12,000 in money and western land. Said he had $2,000 in the bank, and three days after he wanted to borrow $250 for expenses. Blackman never intimated to me that he had any idea of making a deal for himself and Lyon; *the deal with Lyon was a thunderbolt to me. I haven't recovered from it yet.* After I discovered the doings of this "pair," I was somewhat dazed. I sought legal advice, and was told that if I got the deed cancelled on the ground of no consideration, there would be trouble in getting rid of Mr. Wright's deed, for the failure of the consideration was after the transaction with Mr. Wright.

I was advised to arrest them and put them in jail; also, that in case I brought the action to cancel the deed before any negotiations in regard to the property had been made, that the subsequent claims would rest upon Blackman's claim, which was a fraud. If I did it the other way, I might have trouble to cancel Blackman's deed, and a judgment would be no good against him. Mr. Blackman's condition, financially, was pretty low at that time. I didn't discover evidence of the fraudulent representations made to me by Blackman until immediately prior to the commencement of this suit in New York, and I brought suit forthwith—immediately.

134 I went into the deal *relying a great deal upon Mr. Wright. I thought a man in his position and connected with the affair, as it was said he was, that it was a guaranty I would be treated right. And I had confidence that Mr. Wright would not get away with the land; that he would not really attempt it, and that in some way, further on, I would get what was due me.*

I also relied upon the mortgage upon the Iowa land, and encumbrances and conveyances as being a protection and notice to other parties. I didn't think that Blackman was in a position where he could do anything with the land. I thought *his position was such that anything he could do would be done in bad faith by anybody who would take hold of it with him,* and it seemed to me, *the property was in a position where it could not be well meddled with by anybody in good faith.*

And after I found they were doing these things, I made a deed of the property to my wife. After I went down East, Blackman had given a man named Townsend a mortgage for $250. Townsend was a lawyer, and found out that Blackman didn't own the land, and was "going for him;" and Blackman came to me to go on his bond for this $250, when the man held a mortgage on my land for the same amount, and I didn't know it, and *I had to pay the bond.* After I left Chicago for New York, I never made any agreement of settlement with Mr. Blackman as to waiving my right to the Iowa land. *The recovery of that was foremost always, I wouldn't have given*

the land for all that Blackman possessed in New York; wouldn't begin to do it.

The negotiations we had in New York, *afterward*, was for
135 money to be *advanced* by me to Blackman. He represented he owned 25 per cent. of the whole enterprise, and on this representation he got money from me. He represented that he would execute agreements to do so, and *these moneys were all advanced before any agreement was ever executed or completed. I think I may have had to pay Blackman's fare from Chicago, but I never paid him any money on any executed agreement or contract that I ever signed with him or Haldane in New York city, after I was in Chicago, and there was no*
1 *agreement or contract ever executed.*

Blackman was needing money very much, and was in serious trouble with Haldane. Haldane had given a note of $1,000 to a lewd woman of the town, and Mr. Blackman had endorsed it, and this woman had sued Blackman for the thousand dollars, and there was going to be a grand expose. I didn't know that Blackman was afraid of an expose on his own account, yet he was wonderfully anxious to settle the suit.

"Now," he says, "if you will turn into this thing and assist me to settle up these difficulties with Haldane and get this suit withdrawn, I will make an even divide of my interest with you, and whatever the settlement is with Haldane, half of it shall be yours."

I got the suit withdrawn, and labored between Haldane and Blackman some two months to get a settlement of their interests, and one day Haldane said to me, "Mr. Dull, I can't talk frankly with you until you get through with Blackman." I said, "It looks as though I am through with Blackman." "Well," he said, "Blackman and I settled our difficulties and signed a contract twenty days ago." *That ended my connection with Mr. Blackman. I had advanced him over $2,000. "Yes," Haldane said, says he, "we got together,*
136 *and Blackman said, "Damn it, Charley, if there is anything to be given up, I would rather give it up to you; Dull will cut me out." And then Haldane said to Blackman, "You have had Dull a long time, and got a good lot of money out of him, let me 'pull his leg' a while.'"*

Haldane told me at one time this—says he: "*Baldwin is howling about not getting any money out of this steal, I call it—of course you know, and he wants to know when and where and how he is coming in; but he says, 'Wright sits back quietly and collects the rents, and says, 'Boys, I don't see how the devil we are going to hold that New York property and this land out here, and beat Dull out of the whole of it.*" That's what Haldane told me. *After these developments I dropped them, and commenced this action.* Blackman, in the meantime, had amended his petition in Iowa, and made me a defendant, and endeavored to get service by publication. I was only informed of it through a friend. *I have been after them ever since, and have prosecuted both cases vigorously.*

There were three or four memorandums or contracts prepared for me to sign, but *I never signed any of them. There was nothing com-*

pleted or reduced to writing; it was merely a scheme to get money from me.

I have nothing to show from Blackman, except *unexecuted memoranda;* it was nothing but "*rainbow chasing.*"

In Chicago, Duffie was there, as I took it, fixing up Mr. Blackman's interest. The only unison of work between myself and Blackman was in the lawsuit against Wright. I had no other interest, and it was for the sole purpose to enable me to recover my land; *only so far as to get him to help to cancel the deed to Mr.*
137 *Wright. There never was any agreement, understanding or talk at any time, either at Chicago or subsequent thereto, either in the presence of Judge Duffie or Blackman, or either of them, that I waived my right to the Iowa land. I considered the Iowa land worth a great deal more than all the rest, for that was certain, and the other was not. These other matters were to aid him in the New York deal for a money consideration. There is no sense in saying that I in any manner waived my right to the Iowa land. That is purely manufactured, every bit of it.*

Recross-examination:

It would make no difference to me whether Mr. Lyon should hear in regard to my New York transactions. It is something I would not care anything about, one way or the other. *I never go into a transaction that I don't think is right; that my conscience don't tell me is straight.*

What I mean was, I told Lyon I was in a position to turn the property over to him in case of settlement. The "pair," referred to in my testimony, is Blackman and Haldane. *The fact that Blackman settled with Lyon, and took money from him for property conveyed to me, probably comes under the head of fraud; at least I thought so.*

(Witness is shown a memorandum, Ex. 2.)

It is not a copy of any memorandum or arrangement with Blackman. The memorandum was in Mr. Blackman's own handwriting, and was written up according to his understanding. I never paid but little attention to it.

Blackman represented that he owned 25 per cent. interest in the New York enterprise. He and Haldane had difficulties,
138 which they settled between themselves. *After that I had nothing more to do with them.*

Redirect:

Mr. Haldane furnished the information as to the representations of Blackman at the time. He brought me the evidence so I could bring the action. Mr. Keogh was my attorney; Mr. Haldane did not appear. *None of the transactions, after I left Chicago, in the spring of 1892, had anything to do in connection with the Iowa land—had no connection with it whatever.* Haldane told me that Blackman said that "*he wanted to know if he couldn't work that land deal into this memorandum as a settlement of the Iowa land.*" *Haldane said to him:*

"Does he say anything about it?" *"No."* *"Well, then, of course you can't do it."* He says: *"Mr. Dull understands I am to redeed him that land, but I have not said for how much, and winked his eye."* After I left Chicago there was no understanding, agreement or arrangement, whereby I waived my right to the Iowa land, nor was there any memorandum ever completed or executed, or any agreement made, either between myself and Blackman, that had any relation to the relinquishment whatever of that land. Nor was there any arrangement, memoranda or contract ever made or completed between myself and Haldane, or Blackman, in reference to that land *The only arrangement was, that Mr. Blackman was to redeed to me that land as quick as he could cancel the deed to Mr. Wright, and he had a lawsuit then pending to do that. And all these other transactions, which I have testified to on Mr. Baldwin's cross-examination, proved to be schemes to get money out of me, and were finally dropped when I found what they were.*

139 The defendant Dull moves to strike out all the cross-examination of himself, as to transactions had by Blackman and Haldane with him subsequent to the spring of 1892, as immaterial and hearsay, and having no bearing upon the issues in this case.

A. C. BURDICK

Have lived in Chicago for the last twenty years; dealer in grain and contractor. Am acquainted with Daniel Dull, and met him with Duffie and Blackman at the Palmer house in Chicago, in February, 1892, where I was boarding at the time. *I was present when they talked over the fraud and failure of consideration in regard to the New York property. It was talked over in the presence of Mr. Duffie.* Duffie said he hoped that Mr. Dull and Blackman would succeed in settling their affair over this land matter; would come to some satisfactory arrangement, and if they did so, that he would probably take part in this New York affair. But if it was not settled up he said he didn't care to have anything to do with it. The *the* conversation first occurred in the lobby of the Palmer house as to the Blackman transaction, and Mr. Dull says I asked Duffie what he thought of the transaction, and Duffie said: *"I don't know what it is in your country, but in our country we call it high swindling."*

Duffie acquiesced in what Mr. Dull had said, and was willing to have it go in that way, that he regarded it as high swindling. In the last conversation, Duffie said that he would probably go to New York and take part in the New York deal. My understanding was *that no arrangements had been made of their matters, but they hoped there might be when they got to New York. They arrived at no agree-*
140 *ment or understanding about the matter, but simply talked it over.* During a conversation in regard to the New York matter, I intimated to Mr. Blackman that it looked to me it would be for his interest to settle this matter up in some way. *That it looked to me as if he was criminally liable.*

Mr. Duffie said to me, that Dull and Blackman were talking over

their matters, and that "*he hoped that Mr. Dull would get his land back.*"

Blackman expressed himself as having done wrong; that he had wronged Mr. Dull grossly, and he seemed to be penitent and willing to cure the wrong, as far as possible, in regard to this land. *He offered to do all that was in his power to do, to see that Mr. Dull got the title of his land back again.* I intimated to him that he had done wrong, and at the same time spoke of his being criminally liable, and he said that *he expected Mr. Dull would get his land back.* I insisted to Mr. Dull that it looked to me a good deal, from past experience and what I knew of some other matters, that this was merely a scheme to get more money. I said, "It is money, money, and I would not be surprised if demand is made upon you before you leave Chicago, and the proper thing to do, if any arrangement was made, was to have it made now, and reduce it to writing. *The only thing they talked of while Duffie was there, was this fraud that had been committed on Mr. Dull by Mr. Blackman, and the arrangement was made to go to New York and adjust matters there, and Judge Duffie knew of it.* The final arrangements, if any, were to be made in New York. *There isn't the least doubt in my mind that Duffie knew of it. I have no doubt that Duffie understood that he was acting with Blackman, and was his assistant attorney, to help adjust matters with Mr. Dull.*

141 Cross-examination:

I heard the New York transaction talked over with Mr. Dull, and knew all about it before. They might have had conversations I didn't hear. I have only told what I heard when I was there. I had heard of the New York transaction, and *looked upon it as a crime, and so expressed myself to Blackman, and that it was for his interest to settle with Mr. Dull.*

Defendant Dull on behalf of his answer and cross-petition, offers stipulation as to the evidence of Charles Haldane, as follows:

(After title of the case at bar.)

The substituted plaintiff and intervenor, Ed. Phelan, consents that the certified copy of the testimony of Chas. Haldane given on the trial of the case of Daniel Dull *vs.* John E. Blackman *et al.*, in the supreme court of New York, Westchester county, *may be read as the testimony of the said Charles Haldane, on the trial of this cause;* the same to have the like effect, as if the deposition of said Haldane were taken, or if he were personally present to testify, saving, however, to said plaintiff, and intervenor, all legal objections to said evidence, excepting the objections that said testimony is not in the form of deposition, or that the witness is not personally present to testify, which said objections are hereby waived.

Dated May 31st, 1893.

E. R. DUFFIE,
Attorney for Ed. Phelan.

142 Defendant Dull offers in evidence the testimony of Charles Haldane, in accordance with the above stipulation, as set out on pages 90 to 95, *ante*.

Defendant Dull offers in evidence deed of Daniel Dull to Nellie M. Dull, dated September 22, 1892, and recorded September 26th, 1892.

Also contract between Blackman and Charles Haldane, dated May 19th, 1892, with the schedule of indebtedness thereto annexed.

Defendant Dull moves to strike from the record the testimony of Phelan, Blackman and Duffie as to the alleged agreement relating to the conveyance of the land in controversy, and the changing of a warranty deed into a mortgage, as incompetent, immaterial, irrelevant, hearsay and not the best evidence.

F. J. DAY.

Real-estate dealer, Council Bluffs—12 years. Am acquainted with rental values and value of real property in this county. Am acquainted with the Dull land. In the summer of 1889 it was worth $35.00 per acre. At the present time, $40.00 an acre. Between 1889 and the present time it has varied between these values. The rental value of the cultivated land for the last four years was $3.50 per acre, pasture land $2 per acre.

Cross-examination:

The land in controversy was all improved more or less; fenced and broken up. Some of this land is the finest bottom land on Mosquito creek; some of it is in the hills.

143 Defendant Dull offers in evidence record of mortgage of George F. Wright and wife to A. W. Askwith, on the property in controversy, for $5,000, due in one year. Dated November 16th, 1891, and recorded December 7th, 1891.

It is admitted of record that there has been no assignment made of record, of the mortgage from George F. Wright for $5,000 to A. W. Askwith.

Defendants Daniel Dull and wife rests.

Intervenor's Rebuttal.

MATILDA U. WHARTON.

Reside in Loup City, Neb.; 15 years. Am one of the heirs of the Hopper estate, and have been in New York two years on this business. Knew Mr. Blackman at Loup City, and it was through me he became connected with the prosecution of the Hopper claim. Know Haldane. In 1888 and 1889 Mr. Haldane was attorney for Mr. Blackman. I knew it by his being at Mr. Blackman's office on business.

Cross-examination:

I came from Loup City here to testify, at Mr. Duffie and Blackman's request.

Intervenor offers in evidence "Exhibit No. 5," as follows:

J. E. Blackman & Co., Star auction, sale and boarding stable. Auction sale every Saturday. Gentle driving horses a specialty. Cor. 20th and Izard streets, Omaha, Neb.

NEW YORK CITY, *June 14th*, 1888.

FRIEND DUFFIE: I arrived here on June 1st. Should have
144 written you before, but have been waiting to gather all the facts I could before doing so. I have seen Stryker, the man on the cemetery. He sent me to his lawyer, Col. George Bliss, *who ordered me out of his office, but I did not go until I had said what I went to say.* I am satisfied that Stryker knows his title is not good. I have been over to Jersey City looking up the salt meadows. I borrowed from a clerk in the register's office, the record of the case of Jas. S. Mott *vs.* N. Y. O. & W. R'y Co. I am having a copy of it made, and will send it to you. I have investigated this matter far enough to satisfy myself that there is a big thing here, and I think you and I can dig it out. What bothers me most is how to get at all the heirs. I must find them, and make some arrangements with each one. I met quite a number of them at Peekskill the other day. Some of them are all right, and some are cranks. Now, Judge, if you will meet me here at the earliest date possible, I will go over the ground with you, and you can examine the records for yourself. If you agree with me that this title is all right I will proceed at once to find the heirs and make contracts with each one of them. I don't yet know, of course, what share I will get from them, but as to Mrs. Wharton and *and* her friends I will get one-half after deducting all costs and expenses. I believe I can make a like arrangement with each one of them, and I assure you I will find them if they can be found. I will give you one-half of what I get out of the whole thing for your services, and you to pay out of your half for the services of any attorney you may employ to help you. And you must agree not to employ any one not agreeable to me. In other words, you do all the legal work and get half I get, and you pay your own expenses and I will pay mine. I will take care of court costs. If I can't make this kind of an arrangement with you, I think I can with Charles Haldane of Council
145 Bluffs, and if you don't want it, I will come back and see him. Now, Judge, if you conclude to come down and look it over, and don't find things as I tell you, I will repay you what you are out on the trip. Let me hear from you at once.

Address me at 447 W. 18th St., New York city. Care of F. A. Sheldon.

Sincerely yours, J. E. BLACKMAN.

On the margin of the letter is the following:

"NEW YORK CITY, *Aug.* 10, 1888.

The above-recited proposition shall be understood to mean that Duffie is to have a one-half interest in all property acquired by Blackman from the Hopper heirs.

J. E. BLACKMAN."

Defendant Dull objects to the above exhibit as incompetent and immaterial.

GEORGE F. WRIGHT.

Haldane went to New York as Blackman's attorney in the Hopper heir estate.

Cross-examination:

Personally I never knew of Haldane being admitted to practice in New York. The last time I saw Haldane was in Chicago, *when we were arranging for a conveyance of Mr. Dull's property.*

GEORGE F. WRIGHT.

Am acquainted with the rental value of the Dull land. The rental value for 1890, 1891 and 1892—plow land, $3 per
146 acre; pasture land, $1. I have received as total rental of the land, during the time I have had it, $2,742 and $201.80 taxes, leaving as net rental in my hands, $2,540.20.

Cross-examination:

I paid the taxes of 1889 and 1890, and *we got into difficulty about the land, and was not getting along very satisfactorily with the other parties, so I just quit paying taxes.*

Recalled again by intervenor:

Mr. Dull made the proposition of settlement, he has stated, between us, but was not accepted.

Cross-examination:

There was a proposition made to me by him, but it was not accepted. I counted in the rents in this case, and *I wanted my money and interest, less the rent.* Mr. Dull made me the proposition, but I wanted my money and interest, and what I had paid out for taxes. I told Dull I would consider it, and could not accept it at all if Mr. Baldwin refused to give up the balance of the property, as I held the property to secure myself and the balance of the firm, and I afterwards wrote a letter refusing his proposition.

JOHN E. BLACKMAN.

I instigated the investigation of the Hopper title. The starting point was the laying out of the Bloomingdale road in 1703, which remained a common highway until 1847, when it was widened to 77 feet and became one of the streets of the city of New York. In
1869 the legislature provided for the widening and straight-
147 ening of Broadway, and, among other things, that if any part of the road should be discontinued, the abutting property-owners should have the right to acquire it by paying to the city chamberlain the amount found due, etc.

The road was straightened and widened, and a strip was thrown out to the east, and discontinued a short distance, perhaps 20 or 30 feet from above Fiftieth street, on Broadway, to Fifty-fourth street. A claim was made that the title to the discontinued portion of Broadway was still in the heirs of John Hopper.

(Here follows the genealogy of the Hopper heirs, all of which is objected to by defendant Dull as immaterial and not rebuttal.)

Mr. Dull knew all about the title, and the opinion of the different lawyers, including Governor Hoadley, as to the validity of the claim.

All the papers, showing each heir and their share, were sent to Mr. Dull before the conveyance. I never pretended to tell him the percentage, because I was unable to figure it—the shares were of such different size. Mr. Dull asked me a great many time- what per cent. I thought I had, and my answer always was, that I never figured the percentage; that I had the *pro rata* shares, and he could figure it himself.

Some of the percentages were the $\frac{1}{2000}$ part. At the time of my negotiations with Mr. Dull I could not tell or figure up what per cent. I had. I never tried to figure up, never pretended to; don't know as I could have figured it at all. Don't think Mr. Haldane attempted to figure it. Dull gave me a warranty deed to the Pottawattamie County land. I gave a mortgage and executed
148 a deed, and gave it to Mr. Haldane. I became acquainted with Mr. Dull, first, with the idea of his becoming my agent to make a settlement with Mr. Lyon, but he wanted to figure in such a way that he could get the benefit of forcing his landlord to reform the lease.

The negotiations were principally between Haldane and Mr. Dull. Mr. Dull was requested to see Lyon, and tell him about the claim, after he had investigated it himself; then he would come back and report to us. I think it was about the 1st of November when I conveyed the property to Lyon. I heard that Mr. Dull afterwards went to Europe. Mr. Dull *asked* me for a conveyance of the Iowa land, *he never demanded it.* The next time I saw him was in Chicago, at the Palmer house. Judge Duffie and I roomed together. Mr. Burdick was there, and assumed very important airs, and began to ask me questions which I thought *very leading*, and I wouldn't answer all of them. I have no recollection of his telling me I was a criminal. I think Judge Duffie gave an opinion with reference to the deed being a quitclaim that Dull's mortgage might be enforced, *but it is very indistinct in reference to that.* Dull said he would like to enforce that if he could get that deed. I told Dull I would like to have him furnish money for the New York deal, and I could give such an interest that he could get his pay for his land, and that all matters between him and I would be settled up and fixed.

Q. *I want you to come down to what arrangement, if any, you made with him.*

Q. *Well, Mr. Dull came to no understanding that we could reduce to writing while in Chicago.*

We talked about it, and the talk was to the effect that Dull
149 was to take some interest in the New York property, by paying a certain amount of money to assist in running the matter. I told Dull I had been West, negotiating for the sale of an interest in the New York enterprise; that I had a 12½ per cent. interest I could sell and dispose of. Before leaving Chicago, Dull told me we would go to New York and arrange matters, and when the araangement was made, that *I was to return and dispose of his land for him as his agent*, and the money received for it was to be paid to Mr. Holcomb in releasing the mortgage. It was talked about that I was to sell him an interest in the entire New York deal—a certain per cent. of the whole thing for a consideration. When we got to New York I told him he would have to get possession of the deed, the deed which had been placed in escrow with Mr. Haldane, of the strip. Our interest in the New York enterprise was worth eight or ten millions, or nothing. Dull said it was worth that, if it was worth anything. "Exhibit 2" is a memorandum showing the arrangement between Dull and I. It is a *copy of a copy*, which I have compared. The other I gave to Mr. Dull. Before this memorandum was made he had probably paid me $60 or $70, and *I had told him what my necessities were; that I must make arrangements with some one;* and, probably on the same day, he gave me some drafts *to pay some debts*, at White Plains, in conformity to this contract—about $200. He said there was a change he wanted to place at the bottom. *He kept the memorandum and it was never made.* I kept on getting money from him, with *the accounts he paid for me*—I suppose about $2,100. Mr. Haldane copied this memorandum from the original that I had. Dull was to have one-fifth. I had 25 per cent. to sell—12½ per cent. to Governor Hoadley as attorney fees, Haldane 12½ per cent., and 50 per cent. went to the heirs, under my contract.

But there was a dispute between Haldane and I as to the
150 percentage. We employed the firm of Hoadley, Lauterbeck & Johnson, and made arrangements to prosecute this suit to a termination. The cemetery case was tried, and being lost, an appeal was taken to the supreme court. The Lyle case had been tried and lost and appealed to the general term, and from there we had appealed to the court of appeals.

Hoadley was substituted for Haldane. The case of Blackman *vs.* Lyle is an ejectment case, in which I am plaintiff. It is now pending in the court of appeals. *Dull stopped paying me anything about June 1, 1892, and refused to pay me anything further.* He never asked me to have this memorandum cancelled. *Haldane and I were not on good terms. We did not "speak as we passed by," only, "of course, a little sideways."* Dull wanted to get possession of his deed, he said, to make Lyon fix his contract. I searched and couldn't find it. I suggested that Mr. Haldane would make an affidavit. He showed me a blank memorandum of an affidavit, which he said Haldane would swear to, and I prepared some changes in it, and gave it to Mr. Dull. The case of Blackman *vs.* Rilley, is one of the Hopper cases, and has been argued in the court of appeals, and is now under consideration. The cases have been commenced against all parties

in possession. The cemetery case has been tried in two courts, and is now on appeal to the court of appeals. *Got beaten in every case,* but we are not discouraged.

Have not seen Haldane, to do business with him, since June, 1892. I don't remember telling Haldane that I agreed to convey Dull his Iowa land, but had not said for how much. I might have winked. Here is a bond executed by Daniel Dull, for the purpose of obtaining time for four months from the 1st of April, for
151 the payment of money due from me to Mr. Townsend. Don't know whether it has ever been paid or not. I never told Dull I had 84 or 86 per cent. of the Hopper estate, nor I never told Haldane that Dull thought he was getting 86 per cent. "Exhibit 10" is a letter handed me by Governor Hoadley, which he said he received through the mails from Mr. Dull.

Intervenor offers in evidence extract from letter, "Exhibit 10," to Governor Hoadley, as follows:

"The property that he turned over to you as security to you, he gave nothing for, I understand, and the money he got from my landlord, Lyon, he knows that it was I made it possible for him to get it; otherwise, Lyon, like the rest, would have paid him nothing."

Letter objected to as incompetent and immaterial, and being only a part of the letter.

Cross-examination:

Haldane was not my attorney in the suit of Dull *vs.* Blackman, in New York. I brought this letter of Mr. Dull's to Governor Hoadley, with me from New York. I have not been subpœnaed in this case; have been here about seven weeks, *at Mr. Duffie's request.* Was in consultation, yesterday, with Mr. Baldwin and Judge Duffie, in Mr. Wright's office, about this case. Have been counseling and advising with them, and *furnishing them what documentary evidence they required.* This, "Exhibit 2," in Haldane's handwriting, was furnished by me. I have paid my own expenses and board. Have been stopping with Judge Duffie, in Omaha, part of the time. This case is what has detained me here for seven weeks. I got this
152 letter from Governor Hoadley. This memorandum, "Exhibit 2," was never signed by Mr. Dull. *Dull concluded he would not sign it.* I don't know of any other memorandum I prepared for Dull to sign. I was living with a poor, old widow woman—Mrs. Dorling; had rented a part of her house, and she was importuning me for money to pay the interest on a mortgage, which was about to be foreclosed. I didn't have the money, and got Mr. Dull to advance it for her. I was indebted to her about $2,500, on balance of account. I could not raise the money, and got Mr. Dull to pay the interest on the mortgage to prevent it being foreclosed. He gave me, for her, about $220. I think he went to the bank and paid the interest himself on the mortgage—went and paid the old woman's interest. He never paid me the $1,500, provided in the

memorandum. Then, he was to pay the Townsend matter before March, 1892; *this was a mortgage I had given on his land in Iowa, to get money to go West. Then I mortgaged it to Phelan to get money to go East again.*

Don't know whether the Townsend matter had been paid. *It was my obligation.* Dull did-'t know that Townsend had a mortgage on his property; *I didn't tell him—it was none of his business. Dull never paid me any money voluntarily. I asked him for it.*

"Exhibit 2" is dated May, 1892. I think the original was drawn in February, 1892. Haldane had the original, when he drew it, and Mr. Haldane drew this from a copy he had. Mr. Dull said he was using this cloud upon his landlord's title, to close the whole thing up at once, and he was using the circumstances to arrange a settlement between him and his landlord of the difficulty that existed between them. *That is all there was in it, as far as I know.*

There was no cheating or defrauding his landlord about it;
153 *he was merely trying to compel his landlord to fix up what he had agreed to do by his attorney, he said. And while these negotiations were pending, I gave Mr. Lyon a quitclaim deed of the property.*

We first asked Lyon $15,000, and finally discounted it to $10,000 cash to save the trouble of making proofs, etc. *This was the first money we got from the deal, I guess.*

Q. *You wanted money awful bad, didn't you?*

A. *Sometimes.*

I offered to reconvey the title to Mr. Dull, but he paid no attention to me. I had the equitable title, and I supposed Mr. Wright would give the property up without any trouble. Mr. Haldane said if I would convey to Dull, Mr. Wright would give me a deed. I didn't say anything about this in my letter to Dull. The way Duffie and I met in Chicago, *he and I had a deal pending*, either in New York or Omaha. I explained to him about the deal between me and Mr. Dull. He knew I had given Lyon a deed, and that I had given Mr. Dull a mortgage.

I advised with him about it. Duffie was waiting to see if I made made any arrangement with Dull; if not, we were going back to Omaha, to continue arrangements started there. Didn't hear Duffie call the transaction high swindling. He may have said, perhaps, that I had better make some arrangements with Dull. I do not recollect whether Duffie said he would not go on to New York, or have anything to do with the deal there until I settled with Mr. Dull.

Q. *Do you swear you didn't say so?*

A. *No, sir.*

I thought if Dull would furnish some more money, and
154 take an interest in the New York deal, down there, *so there would be a mutual understanding between us again*, and by so doing lift the mortgage so I could handle this land, *I thought I had better take him in*, instead of the syndicate Mr. Duffie had.

Q. *Do you say you didn't offer to return Mr. Dull's land, there in Chicago?*

A. *It may be I told him.*

I never admitted that I had done wrong; *it didn't turn out as I expected.* Our scheme was to get him to lift the Holcomb mortgage, and sell the land, and take an interest in the New York scheme.

Q. *What right did you have to the land?*

A. *I had a warranty deed.*

He had released all his right to the land by giving a warranty deed, and he had received a mortgage on the New York property for it, and *if he didn't get the New York property it was his own fault.* We got $10,000 for a quitclaim deed of it.

Q. Did you sell it, subject to the mortgage?

A. We quitclaimed it.

We didn't put any mortgage in the deed *A man would have to take his chances.* I cannot explain why I never thought of this point in the trial in New York. I probably wasn't asked the question. Don't know whether I ever made such a claim in the pleadings or evidence in the case of Dull *vs.* Blackman, in New York.

155 Q. *Did you ever make any settlement with Mr. Dull when you left Chicago?*

A. *No, sir.*

(Witness is asked to examine "Exhibit 12.")

I think Mr. Haldane gave this to me. I think Mr. Haldane drew it, *at my request.* It was prepared for Mr. Dull to sign; if Mr. Dull wanted to sign it he could. It is a memorandum of an agreement *to be* entered into at some other time.

The following clause in "Exhibit 12" is read to witness:

"Whereas, the said Dull, with the consent of said Blackman, is about to go to Council Bluffs, Iowa, for the purpose of inducing one George F. Wright to release a certain pretended claim held by him against certain lands in Pottawattamie county, Iowa, the legal title to which is in said Blackman, it is understood that if it shall become necessary, that the said Dull is authorized to agree with said Wright for and in behalf of said Blackman, that said Blackman will assign to said Wright, by good and sufficient instrument of writing, not to exceed 2½ per cent. of his interest in said (New York) property, as a consideration for such release. And said Blackman agrees, in that event, upon being notified that said Wright will accept such assignment, to make, execute and deliver the same."

I remember all about this; it was talked between us to get this unjust claim of Wright's off the land. This had nothing to do with Dull's waiver to the Iowa land. *He waived it when he signed the warranty deed.*

156 *I think Dull ought to follow the consideration.* After we left Chicago there was never any written agreement signed between us. *I had succeeded in getting about $2,500 out of Dull through what was called "understandings."* I think, possibly, *I suggested to Mr. Dull,* after he came back from Chicago, that *he had better get the deed from Haldane that had been left in escrow*—that it might help

in making a favorable settlement with his landlord. I drew a draft of an affidavit for Haldane to sign, and gave it to Mr. Dull. Don't know whether anything was ever done about this matter between him and his landlord. I won't swear but what *I suggested this thing to him.* Dull wanted more than he had agreed to take under the contract; he wanted it for nothing, and *wanted me to pay him back money I had.* A great many contingencies of that kind were put on afterwards.

Q. *He then dropped the whole matter?*

A. *He stopped paying me money; that was the worst of it at that time.*

I have no recollection of any conversation with Haldane in regard to these memoranda, prepared for signature, and I don't recollect of telling Haldane "that if *I would be bound by it, be damned if I would do it.*"

Q. *You swear that didn't occur?*

A. *I couldn't tell you; we used to have "gin fizzes," occasionally.*

All the suits in regard to this New York property have been decided adversely to us. We have not got enough out of it to pay our running expenses. Have been in the auctioneer business for some time. Don't know what Haldane has been doing.

157 Q. *Did Duffie know you hadn't come to an arrangement, in Chicago?*

A. *He knew it was partially settled. Told him would let him know when I got back to New York.*

He knew there was nothing definitely settled, I suppose. I swore, in my answer, that an absolute settlement was made in Chicago; but it was just talk and understanding that we would arrange it in New York.

I was in jail forty-nine days, at Albany, on a criminal charge, and was finally released on bail.

E. R. DUFFIE.

Have been eight years a judge of the fourteenth judicial circuit of Iowa. The letter from Mr. Blackman, in June, 1888, is the first written evidence of my employment. I was in New York the summer of 1888. Some time in 1890, I think, Baldwin informed him that I was going to claim an interest in the land, and we settled our affairs by agreeing that he was to pay me $5,000 for what I had done. As I was leaving the hotel for the train, in February, 1892, in Chicago, *after* seeing Dull, Blackman told me he had deeded the land to Phelan, and got some money. In January, 1892, Blackman came to Omaha, wishing to sell a 12½ per cent. interest in the New York scheme, to raise money. I was called to New York, and when I got back to Chicago, I met Blackman there. He told me he had telegraphed or written Dull. Dull seemed quite anxious about his New York property, and asked my opinion. I told Mr. Dull that the law generally was, that the man who took by a quitclaim deed was not a *bona fide* purchaser, and I thought he could either

158 enforce his mortgage, or *after the title was established* enforce his deed, and that whatever the law might be, that if Lyon

had knowledge of the purchase of the property from Blackman, prior to taking his deed, that all his rights could be preserved. I was there two days, and *don't think this was referred to again. I don't know what "high swindling" is.* Dull asked me, two or three times, what I thought was the legal effect of Mr. Blackman's actions, in selling the land to Lyon after having deeded it to him. *I told him I was a friend of Blackman's,* and that he ought not to press me for an opinion upon it; but, *on the last day* he pressed me so hard, that I said to him, as near as I can remember, that I didn't know what their statute was down there, but if he could show that Blackman had sold this land to Lyon, after the sale to him, for the purpose of cheating him out of his property, that *he could make a case of criminal fraud out of it.* The complaint Dull made to me was, that after he had bought the land, and deeded this 551 acres in controversy, to Mr. Blackman, he had afterwards sold it to Mr. Lyon, his landlord. Dull said he always thought Blackman would make the matter right some time.

Both Blackman and Dull stated to me that they had arrived at an "*understanding.*" After that I came home, and corresponded with Blackman until some time in June, when I ceased to get letters from him. I then went to Phelan and told him that I preferred to have him secure my claim in the form of a mortgage; that Blackman and I had agreed on $5,000, as a settlement, and I was going to add $500 more to that for the other services. The mortgage was executed on this 551 acres of land in controversy, in August. In September, 1892, Blackman came out, and I wanted him to ratify Phelan's act in making the mortgage, and he did so, and I executed to him a receipt. Blackman had come out to try the
159 case, and then, it being postponed, wanted to sell the land. *Phelan was quite a dealer in land,* and we first tried to arrange Wright's claim. I said to Blackman that *Phelan was an old client and friend of mine,* and I would go out and look at the land, and ascertain about its value. I ascertained there was no trouble with the title, except the Holcomb mortgage, and a mortgage held by the Seabrook National bank, and a contract of sale was finally drawn up between Blackman and Phelan and me.

Cross-examination:

My business with Mr. Blackman terminated some time in 1888. I was there the greater part of the summer of 1888; merely looked up the title. There was no claim settled, nor any title to the property exchanged, while I was there. The contract merely called for a certain interest in the land, and it was changed to a money consideration, I think, in 1890. I never took Mr. Blackman's note for the amount. We just lumped it off. He afterwards employed Haldane. I might say, here, that *I was dissipating at the time somewhat,* and he thought, perhaps, he had better get Haldane. That was two years after I had done the work. I had never seen him or heard from him, and never demanded it of him for two years afterward. *In fact, I never asked him to pay it. I think that was his own*

proposition. When he came out, in January, he said if he could remove the liens from the land and dispose of it, I should have pay out of the lands. In January, 1892, he came out to employ me to help negotiate an interest in the "New York enterprise" to Judge Connor, Phelan and others. This 12½ per cent. he had to hypothecate for money.

In Chicago I told Blackman I thought he ought to fix this matter up with Dull, and *Blackman even told me that Governor Hoadley told him the same thing.* We talked over these grievances
160 of Mr. Dull with Blackman—that he hadn't received any consideration for his land, etc. It was all talked over. *I understood the whole situation fully.* Dull didn't ask me as an attorney—didn't employ me. *Mr. Dull felt that he had been an injured man, and felt very indignant at the way Blackman had used him. I told Blackman he ought to fix it up.*

I recollect of Mr. Dull asking Blackman what he thought he ought to do to make him whole, and *Blackman said he thought he ought to settle it up with him so that he would get full pay for his land and all his trouble, and make him whole.* The inference from the conversation was, that *Dull was there to get something from Blackman.* Mr. Blackman was very indignant against Mr. Wright respecting the conveyance of the land; that he had paid nothing for it, and that suit had to be brought to set aside the Wright conveyance.

Blackman and Dull went out several times by themselves, and told me only in a general way what the understanding was. I couldn't tell what was said. I asked to have them reduce their settlement to writing; they said they would go to New York and get their attorneys to. *They didn't tell me the details of any settlement.* I knew at that time Blackman had no money to make a settlement with; and I knew there was no money paid at the time. I didn't know at this time that Blackman had given a mortgage to Phelan nor a deed until we went to the train. He said, then, he had borrowed a little money of Phelan, and *he would as soon that Phelan held the title as himself.* There was a good deal said between Mr. Dull and Blackman, in Chicago, that I didn't hear. *I know that the burden of Mr. Dull's complaint was that he had been defrauded out of his land. I think Mr. Burdick, in a general way, has testified*
161 *to what occurred there, except as to going for Mr. Blackman*—that was not in my presence.

I told Dull that if Blackman had made this conveyance to Lyon, with intent to cheat him out of that property, *it was a criminal fraud,* or words to that effect. I did not know what the statute of New York was about it.

After all this conversation in Chicago, I returned to Omaha, and corresponded with Blackman, and then the correspondence suddenly ceased; and then I went to Phelan, in August, and demanded a mortgage to secure Blackman's debt of $5,500. I afterwards appeared as attorney for both Phelan and Blackman in this suit. I verified Blackman's petition and the amended petition, and Phelan's petition of intervention. I can't explain how it is that *on the 13th of October* I swore that Blackman was the absolute and unquali-

fied owner of the property, and *on the 17th of September, prior*, I had sworn that Phelan was the absolute and unqualified owner. I was afraid Phelan didn't have any authority to make a mortgage to me, so I had Blackman ratify it. This contract (October 6, 1892) is the first time that Phelan assumed to pay my indebtedness or the indebtedness of Savage, or any other obligation. I knew the mortgage to Askwith was on the property—that Wright had the title to the property. We spoke about making out a new deed, but I said they would have to have a contract, and might as well embody it in this contract. *Mr. Phelan was not ready to pay for the land fully at the time.* By this contract the mortgage was metamorphosed into a deed. *I never wrote to Mr. Dull to find out if he had settled with Blackman. I didn't inquire of Mr. Blackman whether he had settled with Mr. Dull; never asked him anything about the matter at all.* I
162 went out to see the land because *I didn't want Phelan, who was a friend of mine, to engage in any trade I couldn't recommend. Phelan signed this contract on my representations. He never saw the land. I didn't tell him anything about Dull and Blackman having trouble about it, and don't think he asked me anything about it.* I have been his attorney for four or five years. I told Phelan about the $10,000 Holcomb mortgage and the Seabrook mortgage. I had the deed from Savage back to Blackman in my possession. Blackman was there the time the conversation was going on, at the time of the contract. I told him the land was worth probably $35 an acre—from $27 to $35 per acre. Phelan figured and said he could safely call it worth $15,000, or a little more—from $15,000 to $20,000. When Blackman came out, at the time of signing the contract, *I didn't ask him how matters stood between him and Dull, that I am aware of. I asked him nothing, and he asked me nothing about it. Didn't ask him how he and Mr. Dull were getting along, or whether he had fixed up the deal with Mr. Dull. It seems more like a dream to me, so I don't want to testify positively about it.*

Redirect:

The checks identified by Mr. Phelan (*ante*, page 65), with the exception of the one dated November 29, 1892, and the $75 check all passed through my hands. I know I had the bank telegraph money to New York for Mr. Blackman. I borrowed money on several occasions of Phelan, and the checks dated in August, 1892, I got from him to use in payment of life insurance, and one thing and another, and, *afterwards, by agreement, they were applied upon my fees in this case.* There is another $100 check that is drawn to me as fees in this case—August 15 and August 30; that would be $220; then October 3rd he paid me $100.

163 Recross:

The check of August 30, 1892, and October 3, 1892, for $120 and $100, were not to apply on account of Blackman for Phelan, but on my fees.

The one of $400, dated October 12, 1892—I didn't send all—*only*

$325. Blackman borrowed some money of me, when he was here, and I kept it out of this check. The check, $150, November 29, 1892, went to my son; don't know whether he sent it to Blackman, except as I am informed. *The one of $375 I had telegraphed to him; at that time we both had been served with notice of the suit in New York, and Mr. Dull had already filed his cross-petition, and we had appeared to it*—(Phelan and I); the same when the check of April 1, 1893, for $50, was sent. *The check of March 23, 1893, was not paid to him, but applied upon my fees in this case.* I was attorney for both Blackman and Phelan, and the party with whom this business was done. Blackman has made my office his headquarters. I have consulted with him as counsel, and he has an interest in the result of this suit, unless, as my son has told me, a man named Kridler has bought his interest in the contract, and that a mortgage has been left with him to send for record.

The defendant, Dull, moves to strike from the record all the testimony of the witness Blackman as to the genealogy of the Hopper family and his transactions therewith, and his interest therein; also all his negotiations with the heirs, and the percentages and transactions with the heirs, and conversations with Governor Hoadley, and statements as to communication between Lyon and himself, and of conversations with Haldane and various other parties, for the reason that same is incompetent, immaterial and hearsay.

164 Intervenor, George F. Wright, *et al.* rest.

Defendant Dull's Rebuttal.

DANIEL DULL.

After I left Chicago, the first money I paid to Blackman was *railroad fare* in the depot at Baltimore. When we figured up I had paid him $60, to meet his necessities. *I never paid him any money, only as his necessities demanded it.* Mrs. Dorling was an old widow lady, seventy years old. She had been an invalid thirty years, and had a small interest in the Hopper-heir claim. Blackman said he owed her $2,000; that he had gotten charge of her affairs, and had "put the money on a mortgage in the West at 10 per cent.," and was paying her 8 per cent., and that it was necessary for him to meet her immediate wants, and that he wanted some money to make provision for one of his children, up in the country somewhere, and I paid Mrs. Dorling's interest, and this tuition fee, *to meet his urgent necessities. I have never seen the memorandum, "Exhibit 2," before, until now.* He had sent me this memorandum, "Exhibit 12." There was serious trouble between him and Haldane, and I tried to get matters fixed up between them, until they had their settlement, May 18, 1892. Mr. Blackman came to me with this memorandum, "Exhibit 12," very hard pressed for money; he brought it to me personally, and asked me to sign it, and I refused. He received from me a note for $500 at that time. Mr. Haldane afterwards returned "Exhibit 12" to me. This $500 note was to

take care of some debt he had downtown, which, he said, amounted to $365. I gave him this note of $500 to be cashed and return me the $135. He left with the memorandum and the note, and *I never got any of the money. This note was simply money advanced to meet his necessities. That was the last money I ever paid him.*

165 *There never was any executed agreement between us. There was nothing said in Chicago when Duffie and Blackman were present, that I waived my right to reclaim the land I had been beaten out of. Nothing was said that the largest imagination could construe in any such direction. My land was the essential feature of the whole business. The New York deal was in that kind of shape—so much parleying around about it, etc., that I didn't look upon it as a matter of any value, and the only reason I consented to advance any money on an interest there, was to so shape matters that I could get possession of this land; otherwise I would have had nothing to do with it whatever. The mortgage I got on the property in New York was by agreement between us, withheld from record, as a guaranty of good faith. I trusted them and didn't place it of record.*

I never had any idea of attempting to assert that title in any way against my landlord, because I didn't want to engage in that kind of a mix-up. I couldn't see my way clear to do it. Mr. Blackman proposed to me to get the deed that had been deposited in escrow with Haldane. He said "it would put me in shape so a little pressure could be brought to bear with it." He said "he had visited Haldane's office nights and Sundays," when Haldane was away, and couldn't find it. Nothing was ever done about this at all; simply a little talk in that direction—nothing passed.

I would like to state, for the benefit of my landlord, that he has passed the ten years and made me no trouble, and is going along very nicely. In my letter to Governor Hoadley, the phrase, "Help Blackman to get the money from Mr. Lyon," means that my being

166 in the position I was with my landlord, and taking the steps I did, placed Blackman in a position where it was possible for him to go and sell the claim; *otherwise my landlord would have done as all the rest of the people did on the line—do nothing in the way of settlement, money, or anything else.*

Cross-examination:

I paid Blackman money for the purpose of getting back my land. I paid him to get him along; I didn't know but what I would have to adopt him further on.

I paid him to meet his urgent necessities, and waited for something to turn up.

Letter to Governor Hoadley, as follows:

EXHIBIT I.

Daniel Dull, Broadway, 51st street and 7th avenue.

NEW YORK, *Dec. 15th*, 1892.

Hon. Geo. Hoadly, 120 Broadway, city.

DEAR SIR: Mr. Haldane has mentioned to me the fact that *Blackman has, through you, requested that he—Haldane—try and persuade me to take no further steps against Blackman.*

I assume that you have not been made aware of all the facts, or have been misled as to the true condition, otherwise you would not have identified yourself in such a way with the matter.

In the beginning he obtained, from me, a deed of my land,
167 through misrepresentations, for had he told me the truth I would not, under any circumstances, have been persuaded to deal with him, but I gave him a deed, and agreed to give him possession the first of the coming year, the deed being dated June 25th.

He deceived me as to the amount of interest he owned, also as to his financial condition, as he claimed to own a much larger percentage than he then, or ever has, possessed; he also claimed to have property and plenty of money to prosecute his suits to a termination; while the facts soon proved to be that he had neither property nor money, and so far as I can learn, never did have any of either worthy of mention, except what he has gotten hold of by hook or crook in wronging innocent parties, all of which he has spent in supporting his way of living, and at the same time boasts of the rigid economy that his family has been subjected to.

Of course, you fully understand what he did with the interest that he promised me for my land, or so much of it as he held a deed for. You also know that you urged him to return the land to me, and that he promised to do so. Upon his promise to do this, and upon other false pretenses and false representations, he succeeded not long ago in obtaining from me quite a sum of money—between two and three thousand dollars—and when he learned that I had discovered his tricks, deceptions, false representations and unfaithfulness, and the time had come for him to fulfill his obligations, instead of doing so he went West and made another attempt to steal my land, by pretending to sell it to one named Phelan, and he also mortgaged it to one Duffie, a lawyer, for $5,500.00, as fees for helping him to defraud me out of the property.

And last September, Blackman brought suit against me
168 in Council Bluffs, for the above purpose, giving me no notice of the suit, which, fortunately, I learned through others.

He gave one Townshend a mortgage on my land for $250.00, and then had the cheek, when I was assisting him, to ask me to go on his bond for the amount, which I did, not knowing that he had given a mortgage on my land for the identical amount.

Duffie, his lawyer at Council Bluffs, knew all about the land deal. I met both him and Blackman in Chicago, at Blackman's request. Blackman was then figuring with Duffie to bring him into these

New York suits, and was using one of your letters, which he also showed me, as evidence that Haldane would be forced to withdraw from the suits.

Duffie then said he would have nothing to do with the New York suits until Blackman had settled with me, as he would not touch a suit with such a cloud upon it. I asked him the legal construction of Blackman's offense, and he said it was high swindling.

Of course, Blackman was blaming Haldane for persuading him, and in fact, as he put it, Haldane forced him into the act. I think he said more mean things of Haldane than I had ever heard one person say of another.

He said that I must have confidence in himself; that there never was a time he had not regretted the act, and there never was a time that he did not intend to make it good to me, etc., and he was now ready to do so, and besides, give me a show to make some money, as he termed it, while the facts were, he was cunningly planning to beat me again, and also use me to help him defraud Haldane.

169 Although, so far as my money is concerned, I have the largest investment in the matter of any individual, yet *my first interest is to protect myself from being defrauded out of my land*, and I don't know how much you would like me to stand from this person, but I think I have already stood too much, by far, and I have given him so long a time to correct himself, and assisted him to an extent under such circumstances that I don't really wonder he says I am half fool, and that the amount *of* money he could get out of me was measured by what I could command.

I believe you understand the terrible condition he has, by his methods, placed poor old Mrs. Dorling in. It is really distressing to see and hear the old lady tell how he has misled, deceived and robbed her. The only money she depended upon for support, and to pay her taxes and interest, is gone.

Blackman told me that she was worth some $40,000.00, but the real facts are she only has her home, and that is non-productive and worth not to exceed $18,000.00, and this is heavily mortgaged, with nothing to keep up expenses. But in all her troubles there came a twinkle to her eye, and a hearty laugh, when she related the fact that Blackman was unable to sleep with his family nights, in her home (as he said) on account of the *bedbugs*.

His family occupied her house for a time, and as Mrs. Dorling states, only paid a portion of the rent agreed upon. When Blackman was sent to jail, the old lady knowing his family were destitute, sent for them in the goodness of her heart, to come to her home, and cared for them to the best of her ability, and with all her kindness to him he has apparently been giving the knife to this poor

170 old lady, who has been an invalid and helpless for so many years. Therefore, you see he is no respecter of persons in his methods, no matter how feeble or helpless, or great their extremity.

Now, Blackman has virtually made you the instrument to ask Haldane to use his efforts in deterring me from protecting myself

against his perpetrating upon me all sorts of frauds, and as I said in the beginning, that I assume you have not fully realized the situation, otherwise you would not identify yourself with the subject in such a manner.

The last funds I gave Blackman was a note for $500.00, due in ninety days. It was understood that he was to have it cashed downtown by a certain party, which proved to be false, as he had it cashed uptown by another party, and failed to give me that portion of the $500.00 as understood. The portion that he was to retain of the amount was mainly to be used in paying Mrs. Dorling's taxes, of which he only paid one year, and that the year of 1890, there being now two years due.

And of the $500.00, Blackman was to retain $375.00, about—but he got away with it all, and then, I am told, that when the note was due he advised and urged the party and bank to not extend it, or any part of it, under any consideration. This comes under the head of his malicious practices, and is illustrated by a very frequent saying of his, as follows: "Damn them, they must feel my heel a little more." He made use of this expression to me in connection with Haldane a great many times, and I don't think there was any place or person where he thought he could do him injury by malicious statement, that he would not go. At least he told me of numerous places, and added: "Damn him, I will make him feel my heel." And in this instance I presume he told the truth, or did

do as he stated, as it was in keeping with his methods.

171 Condemning Haldane on the woman question was a hobby with Blackman, as you know, but he would wind up by saying that his own family was first, last and all the time. This is the only virtue that he succeeded in making me believe that he possessed, and when I later on learned to my entire satisfaction that he did not even possess this one, I told him that the only virtue I gave him credit for I was then satisfied he did not possess, but he, of course, denied everything in the strongest manner. I told him that I did not positively know such to be true, but I certainly believed it all true.

I have lately been informed that he is not sleeping at home nights, therefore the supposition is that he is continuing the same methods.

I mention all these matters, as it is only fair to yourself, myself, and all others, Blackman included, that it be known what his methods are, as I am satisfied from expressions you have made to me that you believed Haldane the root of all the evil, and that Blackman was an innocent lamb who had fallen into bad company.

If I did not think that Blackman is about the man I picture him, I would not say so, for I do not think any one is justified in misrepresenting, and besides, I never believed it paid to do so, and if there is any one who thinks well of Blackman I do not know who it is, unless it be yourself, as you are the only person that I have ever known to speak well of him. He came from the West seemingly an adventurer, without any apparent financial, social or

moral responsibility, and has developed such methods, seemingly, as I have placed before you. He evidently has more or less ability in the searching of titles, but his main success seems to be,
172 to use a vulgar expression, in laying for "suckers," a fact that you may be able, with others, to realize a little further on.

What he wants of you now is to protect and assist him in defrauding others, and if you fail in this he will consider you are no friend of his, which is no more inconsistent than for him to take the position that those who object to his unscrup-lous methods are abusing him and deserve to feel his heel.

Blackman had, no doubt, as I am told, one of the best mothers, who wrote him such letters as only such a mother could write to so undeserving a son. He has boasted of showing those letters to unprotected women in order to gain their confidence, in obtaining their deeds, and then tell how he intended to defraud them by wearing them out through delays, etc., and then buy them up for a song.

In bringing suit to protect myself against his attack, I did so in Westchester in order not to publish his methods here as to this act. I also served an injunction upon him, restraining him from further operations, etc., in the suit he brought against me in Iowa. Martin J. Keogh, attorney, serving me here.

My attorneys in the West say that I have evidently fallen into the hands of thieves.

I don't know but what it would be as well that all the dogs be at once let loose and wind him up, for he evidently is depending on manipulating this New York deal, and the parties interested, to protect himself and his methods.

I think the above fairly represents both the situation and the individual that we have to contend with. You are welcome to show this to Blackman, if you like, as I have already
173 expressed myself to him on most of the points, and if he had been frank enough to inform you, it would not be necessary for me to do so now, and would have saved you the annoyance of having forwarded to me a message from him that I stop proceedings and allow him to carry out a most unscrup-lous swindle.

A man of your age; position and unblemished character, cannot afford to be misled into believing in his methods, or giving them either sympathy or support, as there is seemingly no substantial evidence in which, so far as I know or have ever heard, that he does, or even intends to do, the correct thing, and to use Haldane's words, I am astonished at the desperate chances he has taken and the positions he has placed himself in, apparently depending upon the enterprise to prevent him from being intercepted and brought to justice.

I have been put to geat inconvenience, loss and expense through Blackman's unscrup-lous acts. I have borne it with patience and forbearance for more than three years, until in a most presumptuous manner he brought suit against me to establish a notorious fraud, apparently an attempt to maliciously make me feel his heel, whether he gets anything of consequence out of the steal, or not.

What explanations he has given to you, I of course, do not know, but on general principles expect he would tell you anything in order to obtain your sympathy, and as I said in the beginning, I assume that you do not understand the conditions, otherwise you would not be instrumental in attempting to stop proceedings upon my part to protect myself from such an individual, and such acts, and you now know why he refused to arbitrate, and upon what was founded the statement made by you, that Blackman felt certain that he was in the right.

174 My present proceedings against Blackman are to have the deed canceled, as having been obtained by him through false representations, fraud, etc., which suit was precipitated at the time by his dastardly act in suing me, and as the ball is opened, and that by himself, he not being satisfied with his former outrages, I shall therefore not cease until justice is in some manner satisfied, as far as can be done, and if it be decided that he will not bring the suits at once, and also show a disposition to do the correct thing, and settle with me in some fair and satisfactory manner, as agreed. In such case, I propose to bring other proceedings against him of even a more serious character than the present, for there is no question but he has been unwise and wicked enough to make his body responsible for his acts.

I have, some time ago, told him this, but he, as I before said, relies upon the enterprise and those connected with it, to protect him in his methods, which is a condition that cannot continue.

I thoroughly realize the unpleasant situation you are placed in, and as to the differences being harmonized between Haldane and Blackman, I think that Haldane has seen so much of Blackman's methods that he is thoroughly afraid to trust him in the least degree.

When they were settling their differences last summer, I was supposed to be in Blackman's confidence fully, and more or less in Haldane's confidence, and Blackman so misled me that I labored between them for some twenty days after they had signed a contract—to bring them together—as I afterwards learned from Haldane. Blackman having denied there being a contract, and

175 wanted Haldane to change the date, that I might not know when it was made. But Blackman, in a boasting way, several times stated to me that he would make no contract with Haldane that was not cold blooded, and if Haldane got the best of him he would find no fault.

He has in the past three years probably spent upon himself more money by several times than he ever before had to spend in the same length of time, and for that money I doubt if there is one instance where it can be shown that he has given a penny or any other valuable consideration in return.

The property he turned over to you as security he gave nothing for, I understand, and the money he got from my landlord, Lyon, he knows that it was I who made it possible for him to get it, otherwise Lyon, like the rest, would have paid him nothing.

You cannot point out where he has earned one dollar, and yet I

am told he has sustained two families nearly all the time since he came to New York. Through McRea, Townshend, Lyon, Mrs. Dorling, myself and others, he has got out of this deal direct, probably $25,000.00 to $30,000.00 in cash, and he claims he holds all his original percentages except the amount due you, and has virtually not invested a dollar of his own money, as he had none to invest. Therefore, it goes without saying, that for him to obtain this amount of money for nothing requires questionable methods, and many of them.

I think this fairly represents the situation, and if there is any mistake in anything I have said, I shall be pleased to correct it, as the truth is certainly sufficient. But I think you will find it all virtually correct, which is certainly a lamentable fact.

176 I beg your pardon for this long letter, but it has seemed necessary under the circumstances, that you understand the situation.

Judging from a report that I received this morning from my attorneys in Iowa, Blackman is violating direct the injunction that was served upon him some thirty days ago, restraining him from further proceedings there.

I enclose you a circular with references attached, and should you desire more, I refer you to any one who may know me.

Yours truly, DANIEL DULL.

Jan. 24th, 1893.—*E. R. Duffie withdraws his appearance for the plaintiff, John E. Blackman, and upon his application is allowed to appear and prosecute the action in the name of the original plaintiff, John E. Blackman, for and in behalf of Ed. Phelan, the intervenor.*

Also memorandum "Exhibit 12, as follows:

EXHIBIT 12.

Memorandum for agreement *to be entered into* between John E. Blackman and Daniel Dull.

Whereas, said Blackman is the owner of certain undivided interests in real property in the city of New York and in Hudson county, New Jersey, which property is wrongfully occupied by sundry persons and corporations, so that said Blackman has commenced and is about to commence suits at law to recover possession of the same,

Whereas, said Blackman has agreed with one George

177 Hoadly to pay him 12½ per cent. of all money or other proceeds of said property when realized in payment for legal services rendered, and to be rendered in and about the prosecution of said Blackman's claims, and

Whereas, said Blackman has also assigned to Charles Haldane five per cent. of the proceeds of the same property when realized, in payment for services rendered by said Haldane, in the same matters, and

Whereas, by the terms of the contracts held by the persons from whom said Blackman obtained his title to said property, said Black-

man is bound to pay to said persons fifty per cent. of the net proceeds of said property, after deducting expenses and disbursements, and

Whereas said Haldane claims to be entitled to his election to continue to remain as attorney, or counselor, for said Blackman in the prosecution of said claims, and to receive therefor the further percentage of, or proportion, of 13¾ per cent., together with one-half of any amounts in which said Blackman may be benefitted by reason of any deduction which he may be entitled to make under his contract with his grantors, before accounting to them for the 50 per cent. net proceeds above mentioned, and

Whereas, the parties hereto are desirous that said Haldane shall relinquish his connection with said suits and his claim to said 13¾ per cent. of the proceeds of said property, but without incurring his animosity or opposition,

It is understood that said Dull is to use his best endeavors to that end, and especially provide for said Haldane some suitable
178 remunerative office in the office of some attorney, or firm of attorneys, in the city of New York, so that he can be kept in a friendly attitude toward the suits, and his assistance be obtained in case of emergency making it necessary.

Now, therefore, it is understood,

1. Said Blackman is authorized to make any terms with, or concessions to said Haldane which he may think prudent, for the purpose of inducing said Haldane to relinquish said 13¾ per cent., except that said Blackman shall not agree to give him any further percentage of said proceeds over and above the said five per cent.

2. Said Blackman is also authorized to treat with said Haldane (in case he still insists that he has a right to be retained as attorney or counsellor) with a view to his employment at the lowest remuneration possible, and to induce him to surrender and relinquish any contract he may now claim to have for such employment, and to offer him any pecuniary inducement for that purpose. But said Dull shall not be bound by any such arrangement, nor to furnish any money for the purpose of effecting it, unless he consents and agrees thereto.

3. When it shall be finally ascertained what the contract relations between said Blackman and said Haldane are, or are to be, then the parties to this agreement are to have a settlement of all pecuniary transactions between them up to that date under an arrangement now existing between them, and they shall then settle definitely, or as definitely as possible, the precise portion of the title of said property remaining undisposed of and controllable by said Blackman, and they shall then enter into a new contract, by the terms of which said Dull shall be entitled to share with said Blackman in the proportion of not less than one-half of the net proceeds of said
179 Blackman's interests, and of all contingent profits and benefits realized by him out of said property in any way, or the proceeds thereof. Until said contract is made, all pecuniary transactions between the parties shall be governed by the arrangement at present existing between them.

4. When said new contract is executed and delivered, said Dull shall be entitled to a mortgage from said Blackman upon the interest in said proceeds acquired by said Dull under such contract, but this clause is subject to the consent and approval of Hon. George Hoadley.

5. *Whereas, said Dull with the consent of said Blackman is about to go to Council Bluffs, Iowa, for the purpose of inducing one George F. Wright to release a pretended claim held by him against certain lands in Pottawattamie county, Iowa, the legal title to which is in said Blackman, it is understood that if it should become necessary, said Dull is authorized to agree with said Wright for and in behalf of said Blackman, that said Blackman will assign to said Wright by a good and sufficient instrument of writing, not exceeding two and one-half per cent. of his interest in said property as a consideration for such release, and said Blackman agrees in that event, upon being notified that said Wright will accept such assignment to him, execute and deliver the same.*

This agreement shall bind the heirs, executors and administrators of the parties.

Witness our hands this — day of June, 1892.

(No signatures.)

180 Defendant Dull offers in evidence certified copies of pleadings of John E. Blackman, in the case of Dull *vs.* Blackman, in the supreme court, Westchester county, New York, as set out on page 109, *ante*.

Also certified copy of the special findings and decree of said court, as shown on page 109, *ante*.

All parties rest.

After all the evidence was in, the defendant, Dull, on the ground that he has *just discovered* additional testimony-in-chief and rebuttal, offers in evidence *contract of settlement between the intervenor, Phelan, and the defendants, Wright, Duffie, et al.*, and states that the said contract has been discovered since the completion of the evidence, said contract showing a complete settlement between all the parties to this litigation, as against Daniel Dull, and that their apparent opposition is merely fictitious, identification being waived.

Said contract being as follows:—

This agreement witnesseth: That, whereas, there is a suit pending in the district court of Pottawattamie county, Iowa, entitled John E. Blackman, plaintiff, *vs.* George F. Wright, *et al.*, defendants, and Ed. Phelan, intervenor, in which the title to $551\frac{6}{90}$ acres of land in said county is involved, it being the same land conveyed by Daniel Dull and wife to John E. Blackman, by warranty deed of date June 25, 1889, and recorded in Book — of Deeds in the recorder's office of said county; and,

Whereas, Ed. Phelan, the intervenor, and George F. Wright,
181 one of the defendants in said suit, both claim title to said land as against the said Daniel Dull, who is also a defendant in said suit, and as against any grantee of the said Dull; and

Whereas, the said Phelan and the said Wright have both agreed in writing to be bound by any settlement or arrangement of the dispute between them relating to said land, which John N. Baldwin, the attorney for said Wright, and E. R. Duffie, the attorney for said Phelan, may arrive at:

Now, therefore, it is agreed by and between the above-mentioned attorneys of the said Wright and the said Phelan, as follows:

1st. The said George F. Wright and his wife shall execute to Edward Phelan a special warranty deed to the land involved in said suit, warranting the title against any and all conveyances of or liens made on said land by himself.

2nd. The said Phelan shall execute to E. R. Duffie a mortgage on said land to secure the payment of the sum of $4,506.58, with 8 per cent. interest from July 15th, 1893, which said mortgage shall be assigned to the said George F. Wright by the said Duffie.

3rd. Both of said instruments shall be placed in the hands of Joseph H. Millard, of Omaha, Nebraska, and by him held in escrow, to be delivered on the happenings of the following events:

4th. If the title to said land shall be decreed to belong to Daniel Dull, or to any one claiming through him, since his conveyance thereof to John E. Blackman, then and in that event said Millard shall deliver the deed of conveyance executed by Wright and
182 wife to said Wright, or his attorney, John N. Baldwin, and the mortgage executed by Phelan and wife to Phelan or to his attorney Duffie.

5th. Should the title to said land be decreed to belong to either the said Wright or the said Phelan, then and in that event the deed executed to said land by Wright and wife to Phelan is to be delivered to said Phelan, or his attorney, Duffie, and the mortgage is to be delivered to said Wright when the time for appeal from such decree has passed with an appeal being taken, or if appeal is taken then on the affirmance of such decree, but should the decree be reversed the mortgage shall be delivered to said Phelan, or his attorney, Duffie.

6th. Should it be decreed, in the suit above mentioned, that Phelan has title, but that George F. Wright, or any one claiming through him, is entitled to a lien on said land for any sum whatever, then and in that event he shall receipt on the proper record of Pottawattamie county payment of such lien in full, and the Phelan mortgage shall then be delivered to said Wright, subject to the conditions hereinbefore set out.

7th. Should it be decreed that the said Phelan has no title, lien or interest in said land, and that the said Wright has simply a lien, then if the lien of the said Wright, so established, does not exceed the sum of $4,506.58, the deed of Wright to Phelan shall be returned to Wright, or his attorney, and the mortgage of Phelan to Duffie returned to Phelan or Duffie.

8th. Should the lien of the said Wright, so established, exceed the sum of $4,506.58, then the said Wright is to pay to the said Phelan the amount over and above the said $4,506.58, after the

same has been collected, the deed and mortgage to be delivered as set forth in article 7th of this agreement.

183 9th. If the court finds the title in Phelan, it must also charge up the payment of the Holcomb mortgage to balance of land covered by it, or said mortgage must in some manner be provided for as not to longer encumber the land in suit, before the title is decreed to be in Phelan, within the meaning of the 5th article of this agreement.

JOHN N. BALDWIN,
Attorney for George F. Wright.
E. R. DUFFIE,
Attorney for Ed. Phelan.

Regarding the rents for the land, if either Wright or Phelan are decreed to own it, Phelan shall have the rents for 1893, and all subsequent years while out of possession on account of the present litigation.

Each party pledges himself to the other that he has not at this time, and will not in the future, compromise or settle his claim to the land with Dull or grantees, without the written consent of the other.

JOHN N. BALDWIN,
Attorney for George F. Wright.
E. R. DUFFIE,
Attorney for Ed. Phelan.

On the 11th day of July, 1893, the defendants, Daniel Dull and wife, filed

Reply

as follows:—

Come now the defendants, Daniel Dull and wife, and for reply to the various answers and amendments to the answers to

184 his cross-petition by Phelan, Duffie and Wright, deny each and every allegation therein contained.

Denies that he ever abandoned any claim to the land in controversy; denies that he agreed to advance certain sums of money in consideration of any interest in the New York scheme, by reason of which he abandoned the property in controversy; denies that he ever made any settlement with Blackman, or entered into any contract for a settlement with him, as to the land in controversy, but alleges and avers the facts as set out in his original cross-petition.

Further replying, this defendant denies that he had knowledge of the fact that the land in controversy was conveyed to George F. Wright for advances made and to be made, to the extent of ten thousand dollars, to one Haldane, to be used in carrying on the New York enterprise; and denies each and every allegation contained in the amendment to the answer to the cross-petition filed by Phelan, Wright and Duffie, herein.

Further replying, this defendant states that the plaintiff and the defendants, Duffie, Phelan and Wright, have conspired together, as in his original cross-petition stated, for the purpose of defrauding him out of the property in controversy; that the alleged adverse

interests of said defendants in the controversy herein are wholly fictitious, and have no actual existence in fact, but that said parties have fully settled and compromised, and divided up the land in controversy as between themselves, and as against this defendant.

Wherefore he prays judgment as in his original cross-petition.

FLICKINGER BROS.,
Attorneys for Daniel Dull.

185 And the foregoing being all the evidence offered, and all the evidence introduced, and all the evidence offered to be introduced, on the trial of this cause, together with the objections and exceptions of the parties thereto, and the rulings of the court thereon, the same on the — day of July, 1893, is taken under advisement by the court, and on the 5th day of May, 1894, the court enters judgment and decree, as follows:

Decree.

And now on this 5th day of May, 1894, it still being of the regular April, 1894, term of the district court of Pottawattamie county, Iowa, this case having heretofore been submitted to the court upon the pleadings, evidence and argument of counsel, and the court having fully considered the cause, and being fully advised in the premises, finds that on the 25th day of June, 1889, the defendant, Daniel Dull, was the owner in fee of the following-described real estate situated in Pottawattamie county, Iowa, viz:

(Here is description of property in controversy.)

And that on said date he conveyed the same to the plaintiff, John E. Blackman, by deed, containing covenants of general warranty — the said Blackman executed and delivered to said Dull the note of the said Blackman for $10,000, secured by mortgage upon a certain parcel of land then claimed by said Blackman, and lying on the southwest corner of Broadway and 51st street, in the city of New York, and also executed and placed in escrow, a deed to the said Broadway property.

That on the 2nd day of August, 1889, the plaintiff herein conveyed the premises first above described to the defendant, George F.
186 Wright, for the purpose of securing to the said Wright the repayment with interest of any and all moneys not exceeding $10,000, which the said Wright might thereafter advance and loan to the said Blackman, but that no money was advanced and loaned to Blackman by said Wright for which he can claim to hold the said premises as security.

That on the 30th day of January, 1892, the said John E. Blackman made and delivered to the intervenor, Ed. Phelan, a deed containing general covenants of warranty conveying the land first above described to the said Phelan, which said deed, however, was intended as a security for the repayment to said Phelan of certain moneys at that time loaned by him to the said Blackman, and as security for the sum of $5,500 due from Blackman to E. R. Duffie, and about $1,000 due from Blackman to one E. P. Savage, and that

afterwards, and on the 14th day of September, 1892, the said Phelan purchased said land from Blackman, and the said deed of January 30, 1892, was to stand as an absolute conveyance of the land from Blackman to Phelan, subject to the claims against the same held by the said Duffie and the said Savage, as above set forth.

That on the — day of February, 1886, the defendant, Daniel Dull, was the owner of all the lands first above described, and a large body of other lands, amounting altogether to about 1,400 acres, and on said date he mortgaged all of said lands to the defendant W. W. Holcomb, to secure a loan of $10,700, due in two years from that date with 6 per cent. interest thereon. That the lands covered by said mortgage are the following, to wit:

(Here is description of 1,384 acres, including land in controversy.)

187 And that the said Daniel Dull was, at the commencement of this action, the owner of all of said lands in said mortgage described, except such as were deeded by him to the plaintiff Blackman on the 25th of June, 1889, and the southeast quarter (S. E. ¼) of southeast quarter (S. E. ¼) of section ten (10) above described, which was sold by Dull in 1889, and by Holcomb released from the lien of his mortgage.

That on the — day of ——, 1889, the plaintiff Blackman sold and conveyed by quitclaim deed the Broadway property in the city of New York, which he had previously mortgaged to the defendant Daniel Dull, and a conveyance of which he had executed and placed in escrow to be delivered to Dull in the future, and upon the happening of certain events in the future.

That since the commencement of this action the defendant, Daniel Dull, conveyed the land in controversy in this action to his wife, Nellie M. Dull.

That in the month of February, 1892, John E. Blackman, the plaintiff herein, and Daniel Dull, one of the defendants, met in the city of Chicago for the purpose of settling the differences and dispute between them, relating to the land in controversy herein, and that a settlement was effected by which the said Dull was to receive an interest in other lands in the city of New York, and also in lands in the State of New Jersey, to which the said Blackman claimed to hold title in whole or in part, and that both of said parties communicated to the defendant Duffie the fact of a settlement having been reached between them, and that he took his mortgage on the land in controversy herein relying thereon, and that said settlement, while not reduced to writing, was acted on by the parties for some time after their return to the city of New York.

188 That the defendant, Daniel Dull, has never at any time returned, or offered to return, to the plaintiff Blackman the note for $10,000 and the mortgage on the piece of land at Broadway and 51st street, in the city of New York, securing the same, nor has he at any time tendered or offered to return the deed placed in escrow for him, or the title conveyed thereby, but still holds and claims the same.

That the matters alleged in the cross-bill of the said Daniel Dull,

filed herein, and the acts of Blackman alleged in said cross-bill to have been in fraud of the rights of said Dull, and for which it is asked that the conveyance of the land first herein described, made by the said Dull to the said Blackman, should be canceled and set aside, were all known to the said Dull shortly after the same occurred and long before the conveyance of said land by Blackman to Phelan was made, or the mortgage to Duffie was executed, notwithstanding which the said Dull took no steps to assert his title to said land, or to annul the conveyance to said Blackman, until the filing of his cross-bill in this case.

Wherefore, it is ordered, adjudged and decreed that in case the defendant W. W. Holcomb shall elect to foreclose his mortgage, he he shall, in that case, satisfy the same out of the lands covered thereby, excepting the lands first herein described, and which were conveyed by the defendant Dull to the plaintiff Blackman on the 25th day of June, 1889, and all other lands covered by said mortgage, excepting the S. E. ¼ of the S. E. ¼ of section 10, township 76, range 42, shall then be first sold and exhausted to satisfy said Holcomb mortgage before any of the lands first herein described shall be subject thereto; and that the lands in controversy herein shall be subject to sale in satisfaction of said Holcomb mortgage
189 only in the event that the other land covered thereby, excepting the forty-acre tract above described, are insufficient to satisfy the same.

It is further ordered, adjudged, and decreed that the conveyance of the lands first herein described, made by the plaintiff John E. Blackman to George F. Wright, and dated August 2, 1889, and the conveyance of Daniel Dull to Nellie Dull, be, and the same are hereby, cancelled and annulled and held for naught, and the recorder of this county is hereby authorized and required to cancel the same of record by notation on the margin of the book wherein said deeds are recorded, and in the index to the deed record of this county reference to this decree and the cancellation of said conveyances by the terms thereof.

It is further ordered, adjudged, and decreed that the mortgage made on said land by the defendant, George F. Wright, to the defendant, A. W. Askwith, be, and the same is hereby, cancelled and held for naught, and the recorder of this county is hereby authorized and directed to note the cancellation thereof in the record where the same is recorded in the records of this county.

It is further ordered, adjudged, and decreed that the title to the lands in controversy here- *and* first described in this decree, be, and the same is hereby, quieted in the intervenor, Ed. Phelan, as against any and all adverse claims held or made thereto by the defendants, George F. Wright, Chillon M. Farrar, John Trefts, Daniel Dull, Nellie Dull, and A. W. Askwith, and that the said intervenor, Ed. Phelan, be, and he is hereby, decreed to be the absolute owner of said land, subject only to the rights of the defendant, W. W.
190 Holcomb, to satisfy his mortgage out of said lands, after exhausting the other lands covered thereby, as above set forth, and such other lands proving insufficient to satisfy the same, sub-

ject also to the mortgage held by E. R. Duffie, and the claim for $1,000 held against the same by E. P. Savage.

It is further ordered that a writ of possession be issued by the clerk of this court, at any time hereafter, upon the demand of the intervenor, Ed. Phelan, and against Daniel Dull and Nellie Dull, or any person claiming by, through, or under them, and that the sheriff of this county is directed to serve said writ and place the said intervenor, Ed. Phelan, in possession of the premises in dispute in this action.

It is further ordered, adjudged, and decreed that all the costs of this action, including the costs of the intervention and costs of cross-petitions, taxed at $—, are taxed three-fourths against the defendants, Daniel Dull and Nellie Dull, and one-fourth to George F. Wright, and that judgment be rendered against the said defendants, Daniel Dull and Nellie Dull, and George F. Wright, for the same, and that execution issue therefor.

To all of which findings and decree the defendants, Daniel Dull and Nellie Dull, object and except.

H. E. DEEMER, *Judge.*

To all of which judgment and decree the defendants, Daniel Dull and wife, at the time duly except, and within six months from the rendition thereof perfect their appeal to the supreme court
191 of Iowa, by having all the evidence therein extended and certified and filed and made a part of the record, and by serving notice of appeal on the plaintiffs and their codefendants & intervenor, as provided by law.

FLICKINGER BROS.,
Attorneys for Daniel Dull and Nellie M. Dull, Appellants.

192 *Index.*

194½ On the 15th day of Oct., 1895, there was filed in the office of the clerk of said court the following denial of appellees' amended abstract:

195 Filed Oct. 15, 1895. C. T. Jones, clerk supreme court.

"In the Supreme Court of Iowa, October Term, 1895.

JOHN E. BLACKMAN, Appellee,
vs.
GEORGE F. WRIGHT *et al.*, ED. PHELAN, Intervenor, Appellee; DANIEL DULL *et al.*, Appellants. } In Equity.

Appeal from Pottawattamie county district court—Hon. H. E. Deemer, judge.

Flickinger Bros., attorneys for appellants.
E. R. Duffie and Wright & Baldwin, attorneys for appellees.

Appellants' Denial of Appellees' Abstract.

196 Denial of appellees' amendment to abstract.

Come now the appellants, and deny the abstract of appellees in the following particulars:

Appellants objected to all the testimony of the witnesses, Wright and Baldwin, as to conversations had with themselves and Haldane, as hearsay and immaterial.

Objections were made to all the testimony of the witness, Blackman, as to the transactions had between Dull and his landlord, Lyon, as incompetent and immaterial, and also as to the cross-examination of Dull on the same matters, for the same reasons and as not being proper cross-examination.

The letter set out on page 11 of appellees' abstract should be dated October 9, *1889*, instead of 1891.

Appellant denies that the evidence of the witnesses as set out therein is correct, but is distorted, and in case of the witness, Dull, the questions of counsel are interpolated as the answers of the witness, and appellants reaffirm and reassert that their abstract heretofore filed contains all the evidence offered and all the evidence introduced, and all the evidence offered to be introduced on the trial of this cause, together with all objections of counsel thereto and the rulings of the court thereon.

FLICKINGER BROS.,
Attorneys for Appellants."

On the 4th day of March, 1895, there was filed in the office of the clerk of said court appellees' amendment to abstract, in the words and figures following, to wit:

197 Filed Mar. 4, 1895, C. T. Jones, clerk supreme court.

In the Supreme Court of Iowa, at May Term, A. D. 1895.

JOHN E. BLACKMAN, Appellee,
vs.
GEORGE F. WRIGHT, A. W. ASKWITH, F. R. DUFFIE, Ed. Phelan, Intervenor, Appellees, and Daniel Dull and Nellie M. Dull, Appellants. } In Equity.

Appeal from Pottawattamie county district court—Hon. H. E. Deemer, judge.

Flickinger Bros., attorneys for appellants.
E. R. Duffie and Wright & Baldwin, attorneys for appellees.

Appellees' Amendment to Abstract.

198 Come now the appellees herein and deny that the appellants' abstract of record herein is a true and correct abstract of all the testimony in the case, and deny that said abstract contains all of the record and all of the evidence used or offered or introduced on the trial of said cause. Appellees state that all offers of testimony made upon the part of the defendants and appellants, Daniel Dull and Nellie M. Dull, as shown by the record, were objected to by the appellees herein, and that the said abstract fails to show the objections noted. Appellees further state that the following additions, changes and corrections should be added and made to the testimony of the witnesses named below, said witnesses testifying as follows, to wit:

(Page numbers in this amendment refer to proper places in appellants' abstract where this omitted testimony belongs.)

Cross-examination — JOHN E. BLACKMAN:

Page 58, 3rd line from bottom, John E. Blackman testified as follows: The other consideration was the amount due Colonel Savage and $5,000 due Mr. Duffie.

Redirect:

Page 60: My recollection is that it was about $1,300.

Cross-examination of EDWARD PHELAN:

199 Page 66, line 16, Edward Phelan testified as follows: I am positive that Blackman got the money. He told me he had.

Cross-examination of E. R. DUFFIE on behalf of defendant Wright:

E. R. Duffie testified as follows:

Page 67: This paper, "Exhibit G" (the bill referred to at bottom of page 52 appellants' abstract) I had at the time we were negotiating for a settlement. That was the amount Phelan agreed to pay as a settlement. Mr. Wright said these would be the figures as a matter of settlement.

JOHN N. BALDWIN

testified as follows:

Page 72, line 2: And he agreed that if he made this deal of this land and if Mr. Wright would advance him $5,000, the land should be taken by Mr. Wright and held as security for the $5,000 advanced and for any further advancements should it be determined in the meantime whether or not it was necessary. This conversation took place in New York. I came back to Council Bluffs and told Mr. Wright of my talk and arrangements and of Mr. Haldane's agreement, and Mr. Wright said, All right, if he has agreed to give me that land when he gets a deed to it, I will advance this $5,000. Mr. Wright got the money at the Council Bluffs savings bank, deposited it in his own name as trustee, and gave me checks as Mr. Haldane would want the money, and I took the money and deposited it to the cre-it of
200 Charles Haldane in the savings bank in Council Bluffs, and between the latter part of March and the 20th or 27th of August after the reception of this deed he (Haldane) received the total sum of $5,116, from the money so advanced by Mr. Wright. There was a delay about getting the deed. Mr. Wright was advancing this money and he went down there and had some negotiations. The deed finally came from Mr. Blackman to Mr. Wright and was delivered and recorded and Mr. Wright was placed in the possession of the land. Haldane got this $5,000 to carry on the business and to keep himself and his family there and to get money for Mr. Blackman and to pay expenses; they were constantly paying expenses for looking up the records and paying others to look up the records, and he said it was costing a good deal of money and they had to have this to carry on the enterprise.

GEORGE F. WRIGHT.

Page 73, line 3: The last of March, 1889, I think, Mr. Baldwin reported to me an interview which he had had with Mr. Haldane, and told me that Haldane and Blackman were about to make a trade with Dull by which they were to get a portion of a farm situated in Pottawattamie county, near Neola, and that Haldane wanted to know if I would be willing to advance $5,000 if they would give me a deed to this land and take the land in possession and sell them out and pay my advancement with interest and the balance realized from the land to be paid over to Mr. Baldwin for the benefit of the New York enterprise. Knowing the valve of the land, I consented to this, and borrowed $5,000 from the savings bank and had
201 it deposited as a special fund for that purpose, and whenever Mr. Baldwin made a requisition on me for a portion of this money for the purpose of carrying on the New York enterprise I gave him a check for the amount asked for, until the whole amount was checked out. I paid the entire amount of $5,000 and this money all went to New York to carry on this enterprise. Mr. Blackman was present in New York at the time of my negotiations or talks with reference to this deed, when I was there to get it. I never had any knowledge whatever that there was any claim of fraud in the

procuring of the deed from Dull, and Mr. Dull made no complaint to me of any kind. Mr. Dull never made any complaint to me and I never had any knowledge, notice or information of any kind or character that Dull made any complaint against Blackman that the latter had circumvented, over-reached or misled him or procured the deed by fraud. Nothing of this kind ever occurred until long after I advanced and paid the money and got my deed. The first I knew of it was when this notice was served in New York. I never appeared in the suit in New York and I never authorized any one to appear for me. The $5,000 that I advanced was to bear 8 per cent. interest. Mr. Dull never made any claim on me for the rents, issues and profits all during the time I collected the same until lately, I mean within the last year. I had rented for the previous years to different persons and collected the rents. Mr. Hubbard was the principal person and tenant on the farm, and I collected from him the rents. I have heard that Hubbard is a brother-in-law of Dull's. Hubbard was always Dull's representative on this land and lived on the land, and I rented a portion of it to Hubbard.

202 Cross-examination:

The question set out at the bottom of page 73, appellants' abstract, was objected to by appellees as incompetent, immaterial, irrelevant, and calling for a legal conclusion.

Stipulation.

The stipulation referred to on page 74 of appellants' abstract was as follows: It is agreed between all parties to this action that the summons, together with a copy of plaintiffs' bill of complaint, or petition, and order of injunction, marked "Exhibit P," was served upon the defendants therein, George F. Wright, A. W. Askwith, Edward Phelan and Edward R. Duffie, not earlier than the 24th day of December, 1892; that said service was made upon the defendants, Phelan and Duffie, by handing them a copy of the summons, bill of complaint and injunction order, in the city of Council Bluffs, Iowa; that neither of the said parties defendant in said bill had any usual place of residence in the State of New York; that neither of said parties were served in any manner in the State of New York or in any manner except as above set forth, and that none of said parties made any appearance in said action, nor did they authorize any one to appear for them in said suit; that the defendant Blackman in that action appeared in said cause and contested it upon its merits, the original plaintiff in this action.

The defendants Wright, Phelan, Duffie and Askwith objected to the summons, complaint and order of injunction set out on
203 pages 75 and following of appellants' abstract, on the ground that the same were incompetent, immaterial and irrelevant and they could not be admitted as evidence against the parties objecting, as it was shown by the records and the testimony and the record made in this case that the said Wright, Phelan, Duffie and Askwith were not before the court, and that the court had no jurisdiction of their

persons or subject-matter of the suit, and any record made of any such proceeding is absolutely void as to said Wright, Phelan, Duffie and Askwith. Defendants also objected to the certified copy, because the same purported to contain the testimony of Blackman and Haldane and these defendants were not present at said trial and did not have an opportunity to cross-examine said witnesses.

JOHN E. BLACKMAN.

Page 120, top: After "John E. Blackman," insert "called by defendants Dull, was examined on part of said defendants by Mr. Flickinger, attorneys for defendants Dull."

Page 122, middle: After "cross-examination," insert "on behalf of plaintiff Blackman by Judge Duffie."

After end of said cross-examination, insert: I gave a quitclaim to Mr. Lyon to the property on Broadway, New York. This property was occupied by Mr. Dull as a tenant of Mr. Lyon. There was a mortgage on the land deeded by Dull to me and I wanted him to release it. We were to attempt to settle with Mr. Lyon. Mr. Dull, of course, being Lyon's tenant, could not be known in the transaction. Mr. Dull, defendant, requested us to go and notify Lyon. Dull would
arrange interviews or go and see Lyon and tell him how good
204 the title was that we had and then upon that basis refuse to pay
any rent to Lyon. Then he would tell Lyon that he would finally have to get this claim from us. That is, of course, he told me that he told Lyon that. I never was present at any of the conversations. Finally Dull told me to go to Lyon and make a proposition to him that I would settle for $20,000, and also tell Mr. Lyon that the best way to arrange the matter was to buy Dull's building at what it was worth. That is the way Dull wanted to arrange matters. Dull wanted me to do this because he said he could not make any arrangement direct with Lyon because he was Lyon's tenant. Dull told me he had leased the property from Lyon for 20 years and that at the time lease was executed Lyon was having some difficulty with his wife on that day and the lease had been drawn up with a view to the termination of the lease at the expiration of a certain number of years—it may have been five or ten—I have forgotten the number; but at any rate there was a limit, and at that time Lyon could terminate the lease by taking the building at $20,000, or if the building cost less than that Dull was to show him the exact value of it, what it cost, and Lyon was to take the building by paying him that amount less a certain percentage for deterioration of the building. I think the foundation of the building had been started before this negotiation for the lease began. At the time the lease was signed Lyon was nervous and having some trouble with his family and Dull requested him to make the limit for the cost of the building larger—that is, up to exactly what it would cost, and Dull
claimed to me that his attorneys had promised to do that and
205 under that promise from Lyon's attorneys he had executed
the lease; that afterwards Lyon would not do that, and after he went on and erected the building, and it cost him about $54,000.

That he had asked Lyon a great many times to reform the lease and arrange it according to the value of the building, and Lyon refused to do so: and now Dull wanted to buy my claim to this corner for the purpose of holding it over Lyon and forcing him to pay full value for the building. That is what Dull told me was his object in trading with me for the land. After I traded him this corner for the Iowa lands he commenced these negotiations. He did not want his landlord to know what he was doing at all, but he (Dull) wanted to reap the benefits. I told Dull I had to have money to run the enterprise in New York. He promised that he would see his friend Holcomb and have the Seaport mortgage released. After quitclaiming to Lyon I offered to reconvey to Dull this Iowa land. I executed a conveyance and handed it to Haldane and instructed him whenever Dull released to him or turned back to him the mortgage which I gave to Dull at the time, to give this deed. I made this mortgage on this property under the statutes of New York. Mr. Haldane told me that while I could not lawfully make him a deed, I could make him a mortgage for the consideration we had set on the land, to wit, $10,000, and I did so, and delivered it to Dull, and a deed had been executed and placed in escrow. He had statements of the Hopper title and other papers of mine during these negotiations, and I placed this deed in Haldane's hands and requested him to deliver it to Dull whenever he turned over the papers, and I then wrote Dull to that effect. I dictated the letter and then signed it. This is a copy:

206 "261 BROADWAY, NEW YORK, *Oct.* 9, 1891.

Daniel Dull, Esq., New York city.

DEAR SIR: I have delivered to Mr. Haldane deed conveying back to you the Iowa land. While I am under no obligation-, legal obligations, to redeliver this title to you, yet I prefer to do so, especially as it has never been valuable to me for any purpose.

If, therefore, you give to Mr. Haldane the other papers that came into your possession relating to this matter, he will deliver the deed to you.

Yours truly, J. E. BLACKMAN."

Dull never delivered me back the mortgage or the deed in escrow or the papers relating to the title, and he never offered to return them to me.

Page 123, top, add to cross-examination by Mr. Baldwin: Prior to the time I had this conversation with Dull I was acting for Dull. At the time I was acting under instructions from Daniel Dull to negotiate a settlement with Lyon, he (Dull) had a mortgage from me to that very same property for $10,000. At the time I was acting under instructions from Dull to settle with Lyon, and at the time of these different conversations Lyon did not know that Dull in fact had a mortgage on this land. Dull told me he did not want Lyon to know it, and I was instructed by Dull not to

207 say a word to Lyon about Dull having this mortgage. Mr. Lyon had a right, under the contract between him and Dull,

to take this building at $20,000 at the termination of the lease. The object of Dull in negotiating with Lyon was to get this property from Lyon because of his right to exercise the option under the lease of taking the building at a less value than what it was really worth, and it was for these reasons that Dull told me to keep still about the fact that he had a lease on this property and not to tell Lyon of any negotiations whatever that I had with him. Dull told me this repeatedly. Lyon did not live on this property in New York, but Dull did. I never saw Lyon and Dull together. Dull told me he would go to Lyon and scare him and frighten him about the title and refuse to pay him his rent and force Lyon to come to me and make the trade so that he could get the benefit of it. Dull said his plan was to refuse to pay the rent on the ground; that he could claim that my title to Lyon's lot in New York was better than Lyon's own title. Mr. Dull had many interviews with Haldane and myself and Mr. Lamason, attorney, with reference to the Hopper claim. I gave Mr. Dull a mortgage for $10,000 on this Lyon Broadway property, upon which he, Dull, had a lease, in consideration of Dull's conveying to me this Iowa land in controversy We knew that the Broadway property was worth more than $10,000, but we agreed to that deal, and when I gave him this mortgage for $10,000 he gave me the deed. When I settled with Lyon I gave him a quitclaim deed. Dull gave me a warranty deed.

208 DANIEL DULL

testified as follows:

Page 128, top, cross-examination of Daniel Dull by Mr. Baldwin, after the word "cross-examination," add: My wife and I deeded to Mr. Blackman in June, 1889, 551 acres of this land in controversy in Pottawattamie county, Iowa. There were two mortgages on said land, although practically there was only one; that was the Holcomb mortgage for $10,000, no part of which has been paid. At the time of this conveyance Blackman gave to me a mortgage upon the strip of land in New York, formerly belonging to Lyon and upon which I had my building. He also put a deed in escrow. The mortgage and deed were part of the same transaction. Irrespective of the Hopper claim the title to this New York land was in Mr. Lyon, who was my landlord, and I had been in possession under a lease from him for a number of years. I never disputed up to this time the title of Mr. Lyon to this property. This property was about 41 feet on Broadway, New York, and about 24 feet on 51st street.

Page 128, line 15: If I had obtained the title to the Lyon frontage, I would have been in a very nice position to dictate terms to Mr. Lyon. All I had to do with Blackman and Haldane was to procure the title to this frontage of land so that I could dictate to Lyon, and that was entirely my business with them, and no other consideration moved me. When I made this exchange of properties, giving my land in Pottawattamie county for the mortgage on
209 this New York strip, I deemed that I was getting value received. I gave them the deed to the Iowa land and delivered

it outright to them without any agreement about an escrow, and no agreement that it should be kept off the record. I ascertained Mr. Wright had a conveyance to this land from Blackman in August, 1889. I had a consultation with Haldane and Blackman in New York with reference to that conveyance. After I knew Mr. Wright had the conveyance to the land, I still held the mortgage on the Broadway strip. Between June and August, 1889, I was negotiating a settlement with Lyon. I was the person who instituted and instigated and directed the arrangements and negotiations for that settlement with Lyon. I reported to Haldane and Blackman what I did. I was carrying on negotiations between Lyon, my landlord, and Blackman and Haldane, for a settlement of the claim that Blackman and Haldane as representatives of the Hopper heirs were making against the property. I was endeavoring to persuade Mr. Lyon to make a settlement with Blackman and Haldane of the claim they were making against the property. I used to report to them what Lyon would say and I would report to Lyon what Blackman and Haldane would say. I carried on the negotiations almost exclusively and entirely. All during these negotiations thus carried on by me and through June until August, all this time I had this mortgage on this Lyon property, and I never told Lyon that I had this mortgage on this property. I did not tell him I had a mortgage on this property from the very same people I was trying to get him to pay damages to to settle.

210 Page 128, line 20: Do not believe that Mr. Lyon, my landlord, would have paid $10,000 cash to Blackman and Haldane to settle the claim against his property, if he had known that I had a mortgage on it for $10,000.

Page 128, line 22: I knew in August, 1889, of this conveyance to George F. Wright. I knew that the title had been conveyed to him. I never told Lyon of the fact of the conveyance of the Iowa property as a part of the exchange for the New York strip to Mr. Wright. I did not tell A. M. Lyon one thing about these conveyances to me and about the mortgage and the conveyance to Mr. Wright until after Lyon had paid his money to Blackman on this strip. I knew of the delivery of this deed to Mr. Wright in 1889. I knew of the delivery of the possession of the land in 1889. I knew he was in possession in 1890. I heard that he collected the rents in 1890 and 1892. I did not pay any of the taxes, and from the time of the delivery to Mr. Wright of this deed in 1889, when I first knew of it, up until July, 1890, I never said one word to Mr. Wright about this transaction, and I never complained to him about the transaction or that Blackman had no right to deed to him. If I had been able to get the Broadway strip, I would not have cared anything about the Iowa land. I testified before Judge Dykman that I could have put this mortgage on the Broadway property on record at any time that I chose to do so, and it was given to me as a guarantee of good faith, and whenever I saw fit to protect myself from what I thought was bad faith I was at liberty to put the mortgage on record. I had that mortgage as a protection

against bad faith. In case I saw bad faith I had a right to protect myself.

211 Page 129, line 3: I knew in August, 1889, that Blackman had conveyed the property and that he could not reconvey it to me. I did not have to wait until the Lyon conveyance of October, 1889, to know that Blackman could not reconvey to me because he had already conveyed to Mr. Wright. I knew that Blackman had parted with the title and I knew that it was past his power to reconvey to me. This I knew of course still in October, 1889, when Blackman conveyed to Lyon and put it still further beyond his power to reconvey to me. I never said anything to Mr. Wright in 1889 about this transaction. I never told Wright that the consideration had failed and that I did not want him to collect the rents, issues and profits, and with knowledge of the failure of the consideration in his deed in 1889, I permitted him to collect the rents for 1890, 1891 and 1892, and I never brought suit to set aside this conveyance until 1893. When I found out about this conveyance to Wright I tried to get Blackman to tell, and he would not tell, and I tried to get Haldane to tell, and he would not, and finally I got them together and Mr. Haldane said, "I won't tell," and Mr. Blackman said, "I won't tell," and finally Haldane said, "You must tell," and Blackman blurted out, "I have done it;" and that was when I ascertained the fraud, and it was in October or November, 1889. I never asked Haldane whether he advised Blackman to do this. After Blackman deeded to Wright, but before he deeded to Lyon, I knew that Blackman was financially irresponsible. The letter from Blackman written to me to come to Chicago was in 1892, and I went to Chicago. I went there in accordance with this

212 request. Before I got there I knew he had conveyed the property in New York; that he had conveyed the Iowa property to Wright and the New York property to Lyon, and I knew the consideration had failed, and I considered he had practised a fraud on me.

Page 129, line 7: After all these trials and difficulties and frauds that I ascertained that Blackman had practiced on me, still in 1892 I again accepted his representations that he had 25 per cent. of the Hopper tract and entered into a new agreement with him and paid about $3,000 on the agreement. So that after I had ascertained that this man was a "high swindler," had perpetrated a grievous fraud upon me, had misrepresented matters to me and got me to make conveyances, I then entered into new negotiations with him and paid him money.

Page 130, line 2: It is simply my opinion that Judge Duffie came there for his own interest.

Page 130, 6th line from bottom: After I had this conversation in Chicago and after I had been apprised of all the conduct of Blackman and after I had received the opinion of Judge Duffie that Blackman's conduct was "high swindling," I had a talk with Blackman about entering into new negotiations and we were to work in unison together and bring suit against Wright to set aside the conveyance, and since that time I paid Blackman between two and

three thousand dollars, and I paid this money after the Chicago talk and after we were in Chicago together and after we went to
213 New York. I went into partnership with Mr. Blackman and we were to act in harmony together and we virtually allied ourselves together. It was not a Siamese-twin transaction, however. After I knew that Blackman was a "high swindler" and after I knew that he had perpetrated a fraud on me, still I went into partnership with him to beat Wright out of his interest in the land. After he had perpetrated a fraud on me and everything, I entered into that arrangement with him to get possession of my land.

Recross-examination:

When I got knowledge of the deed to Wright in August or September, 1889, I never said anything to Wright about it, and I never made complaint about it. I knew that Blackman had lied to me about his financial standing in 1889 and about the conveyance to Lyon and he never told me he was going to settle with Lyon, and I knew that selling the land was a fraud. I knew that he had settled with Lyon and took money from him for the property he had conveyed to me, and that was not right, and I thought it was a fraud, and I had this information in 1889. The consideration of my conveyance to him had failed. I found that Blackman had lied to me, I found that he had conveyed the Lyon property to him, and from that I claim that the consideration failed; and I knew all of the substantial facts of which I am now complaining to this court, in the summer and fall of 1889, and two years after I knew all of them and after I found out all the practices of Blackman I entered
214 into new negotiations with him. I did not return to Mr. Blackman the memorandum I had entered into with reference to following out the New York enterprise after I had returned from Chicago. I paid money to him after I received this memorandum, and this new arrangement was entered into upon the basis of the representation made by Blackman that he had 25 per cent. interest in the New York property, and I believed that representation or I would not have paid him the money, and I entered into this arrangement at a time when there were difficulties existing between Blackman and Haldane; and after I found that Blackman and Haldane were clashing I employed Haldane and paid him money, and I paid him money since, and I paid Haldane money in the fall of 1892 and the winter of 1893 and employed him as my attorney, and he acted for me in certain matters in New York.

Page 142, line 2: Defendant Wright objected to the evidence here offered of Mr. Haldane as incompetent, immaterial and irrelevant.

Intervenor's Rebuttal.

MATILDA U. WHARTON

testified as follows:

Page 143: Mr. Haldane told me himself that he was Blackman's attorney and he drew a document for me under those circumstances,

and it was signed "J. E. Blackman, by Charles Haldane, attorney." In the negotiations when I was present Haldane acted as attorney for Blackman.

215 JOHN E. BLACKMAN

testified as follows:

Page 147, line 17: Mr. Dull was fully advised of the character of our claim. The attorneys who assisted in the prosecution and investigation were Mr. Laamson, who is attorney of Calvin Brice, and a very able lawyer; Judge Smith was employed by a railway company to investigate the matter, another very able lawyer, and also Charles Winfield, who has written a book on land titles. All the information with reference to the character of the claim and all the opinions of the lawyers were given to Dull and he knew all about it. We had the opinion and brief of Governor Hoadley and he always claimed that our position was good, and the opinion of Governor Hoadley was given to Dull *and* before the deed was executed and before negotiations.

Page 148, 3rd line from bottom: Dull asked Judge Duffie if he was of the opinion that the deed could be enforced at the present time against Dull or against Lyon, if it was in existence, and my impression is that Duffie said that the deed, being a quitclaim, could be enforced.

Page 149, line 11: Dull told me that the time would soon come around when the first option in the lease with Lyon would expire, and that he wanted to enfore that lien or the claim or deed against Lyon, and that if there was any legal way of enforcing the deed or mortgage against Lyon, he wanted to do it. The arrangement was

216 I was to turn over and sell him an interest in the New York deal, a certain interest in the Hopper claim. I told him in Chicago that the first thing he had to do was to get possession of the deed. We went to New York together. The New York arrangement with him was at 219 West 53rd St. I told Dull at this time, in answer to his questions as to my opinion of the value, that if it was worth anything, it was worth eight or ten millions. "Exhibit 2" is a copy of the memorandum that evidenced the arrangement between Dull and myself. The original of that was given to Dull, that is, one of them. There were two. I kept the rough draft of it and gave another one to Dull and Dull was to take it to his office and have his clerk copy it. "Exhibit 2" is a correct copy. I have compared it. Dull took this memorandum and it correctly states our arrangement. It was not signed. On the day, I think, of the delivery to him of this memorandum he paid me money to pay some debts, and this was in conformity to this agreement. And then he wanted afterwards to add something to the contract to make it binding on the heirs, etc. He kept his original, and so far as carrying out the contract on his part he kept giving me money until I think I got from him $2,100. I do not think there was any difference between this "Exhibit 2" and the original contract as made. The $250 as provided by the contract was paid by Mr. Dull. The

firm of Hoadley, Lauterbeck & Johnson was employed and under arrangements with Hoadley, the briefs were made and the expenses and costs of the suits were arranged for, and I had all my arrangements made to prosecute the suits to final determination. Expenses were incurred and suits prosecuted and one was tried. Work was done in this case in preparing for appeal, etc.; arguments,
217 abstracts and briefs were prepared and expenses incurred. Dull never asked me for this contract back. When we got back from New York Dull wanted me to look through my papers and Haldane's papers and see if I could find the deed or mortgage I gave him for the Lyon strip. I searched for it and was unable to find it. I am acquainted with the handwriting of Charles Haldane. I have examined this paper, marked "Exhibit 9," and it is in his handwriting. Dull gave me this paper and asked me if I thought that would be the right sort of an affidavit for Haldane to swear to. I never had any conversation with Haldane about this affidavit. Dull asked my opinion about it and I suggested some changes. He told me to take this affidavit and draw one with my suggested changes. I gave it back to Dull and I have never seen it since. The case of Blackman *vs.* Riley, involving the questions in this Hopper estate claim, was submitted in the court of appeals since the execution of "Exhibit 2." I never told Dull I had 84 or 86 per cent. of the Hopper estate. "Exhibit 10" is a letter, and the signature is Mr. Dull's. I know it is his signature and know it is his handwriting. I got that letter from Governor Hoadley. Governor Hoadley told me he received this letter through the mails. Haldane was my attorney in this transaction. I depended upon him in all these transactions and relied upon him.

Cross-examination:

Page 152, bottom: Blackman did not say "There was no
218 cheating or defrauding his landlord about it," as stated in appellants' abstract. He in reality testified as follows:

Q. There was no attempt to cheat or defraud his landlord?

A. Force his landlord to reform the lease.

Q. Was there any cheating or defrauding of his landlord in it?

A. Well, I couldn't tell you that.

Page 153, bottom: The question "Do you swear *you* didn't say so" should be "Do you swear *he* didn't say so."

Redirect examination:

The expression in Dull's letter "And the money he got from my landlord Lyon he knows that it was I who made it possible for him to get it, otherwise Lyon like the rest would have paid him nothing," this refers to the money I got from Lyon for the quitclaim deed. I did not get any other money from Lyon of any kind or character. The complaint that Dull made, after I had executed this contract, was that he wanted to change it from 5 per cent. to 12½ per cent., and the consideration from $5,000 to nothing. That is all.

E. R. DUFFIE

testified as follows:

Being examined on part of intervenor Phelan, testified as follows:

"I would like to say and have the record show, if your honor please, that since I learned of this New York suit and that I would
219 necessarily become a witness in the case, I had Mr. Charles Greene, of Omaha, associated with me in the case to try it. He promised to be here last Thursday morning but informed me that he was detained by the general manager of the Burlington road, for which he is attorney, and by the general solicitor of that road, on business in connection with the new tariff law of Nebraska, and in connection with an order made by the city council to erect some viaducts over their tracks in the city of Omaha, and that is the reason he is not here to try the case. I did not expect to take any hand as attorney in the case."

Lived in Iowa for 22 years; attorney-at-law; judge for eight years.

Page 157, line 21: Afterwards I got a letter in which he said at the time he deeded this land to Phelan he instructed him that he was to hold it to secure me for what was due me and to secure Colonel Savage what was due him. This was the letter:

NEW YORK CITY, *Feb. 14th*, 1892.

E. R. Duffie, Omaha.

DEAR JUDGE: I should have written you before, but have been very busy since my return. The Riley case has been argued and submitted to the general term. Haldane made the oral argument and parties who heard him say that it was very able. I did not have the time, or at least did not think to tell you when I saw you in Chicago, what I did about the land. I was obliged to have
220 a little more money and borrowed it from Ed. Phelan. I gave him a deed to the 551 acres of Iowa land and told him to hold the title as security for the loan first, and 2nd, to hold it in trust to secure you your fees agreed upon between us, and forget whether I told him the amount, but I think I did; if I did not, you can do so, for perhaps I did not; 3rd, to hold as security in trust for Col. E. P. Savage for the amount I owe him, which is about $1,000. You had better see Ed. and go over the matter with him, for he was in a hurry when I had my talk with him and may not have thoroughly understood the details.

Now, Judge, I want you to push that suit against Wright. Prepare depositions for Haldane and send them down, also send me copy of all papers in the case as soon as filed. Gov. Hoadley is improving slowly.

Hastily yours, J. E. BLACKMAN.

Page 157, line 24: There is nothing whatever in the statement of Mr. Burdick that I bolted into the room and the first thing that I said was that I thought he could enforce his rights under that deed and if he desired you would go down to New York and do it, and if you did not win, it would not cost him anything. Nothing of the kind occurred.

Page 157, line 25: I had understood from my former talk with Blackman and my talk with Dull previous to this that after Blackman made the mortgage and executed the deed which was placed in escrow that Mr. Blackman had quitclaimed the property to Lyon.

221 Page 158, line 2: After "Whatever the law might be," insert "in relation to purchasers under quitclaim deeds."

Page 158, line 4: Dull appeared very anxious about what interest he might still have notwithstanding the sale to Lyon and he wanted my opinion about it. I never used such an expression as "high swindling" in my life.

Page 158, line 15: Mr. Dull in Chicago made no claim or statement whatever with reference to the fact that Blackman had made any representations to him in procuring the deed from him for the Iowa land. He had no complaint of any kind to make. The *only* complaint he made to me, and the only complaint was, that after he had bought the land and deeded to Mr. Blackman this 551 acres in controversy, he had afterwards sold it to Mr. Lyon, his landlord. Either myself or Blackman said to him that he had been very quiet under the circumstances and appeared to rest easy; had not taken any steps to secure his pay or to recover back this land.

Page 158, line 22: Both Blackman and Dull told me that they had arrived at a settlement of their affairs, a conclusion, and I went to a stand in the center of the room, where there was writing material and said we had better reduce it to writing right away; and they said "No," that Blackman was going back to New York with Dull and they would reduce it to writing when they got to New York, and they would draw up a written contract there.

222 Page 158, line 28: After "other services" add "which I had done Blackman."

Page 158, last line: After "I executed to him a receipt" add "and surrendered to him the contract I had with him."

Cross-examination:

Page 159, line 16: The sentence in appellant's abstract "We just lumped it off," is not correct and is not in the record, and the witness did not so state.

Page 159, line 19: He said he expected to pay for what I had done, and if $5,000 was satisfactory he would pay me that amount.

Page 160, line 1: Blackman told me that after he had sold the land to Lyon he had told Dull if he did not remove the mortgage here he was going to sell the land, and after he had sold the land to Lyon he had offered to reconvey, had even made out a deed and written to Dull that it was in Haldane's hands and he could have it by surrendering the papers he had given him, and this was after he had made the conveyance to Wright. He said Dull would not make any reply at all.

Page 161, line 17: When this amended petition was filed in October it was not the intention to prosecute the case to a final determination in the name of Blackman. In that action as between him

and Wright it was claimed that he was still the absolute owner of that property.

223 *Defendant Dull's Rebuttal.*

DANIEL DULL testified as follows, page 164, last line:

This note was simply advanced to meet his emergencies. He was to give me a contract for a half interest, and the money I had advanced him up to the time of this contract was to be taken out—that is, it was to be taken out of the whole interest, but any money that I should advance him to meet his necessities after that was to be taken out of his individual interest. The money I paid him prior to this time was not on any agreement, but to meet emergencies, necessities that he represented to me. I paid him a little money at one time there upon the memorandum. I paid him a little on that until I discovered that he did not hold the interest that he said he did, and then I did not pay him any more.

Page 165, 4th line from bottom: Of course it took Mr. Lyon some time to get over the feeling that I had with him in putting myself in such a position as I did.

Page 165, last line: After "taking the steps I did," add "with my landlord in regard to that title, declining to pay him rents, etc."

Cross-examination:

I did not have very much faith in the New York enterprise. After I found out Blackman's fraud in 1889, then I patched up our difficulties in 1892 and paid him money. I paid him this money, as I have testified before, to take care of his interest, and not
224 because I liked him. After having this opinion of him myself, after having called him a swindler, and after having had the opinion of lawyers that he had practised a fraud on me, I did not pay him that money because I liked him, and I did not pay it out of philanthropy. I paid it mainly for the purpose of getting my land back. I did swear that I paid it to him because I got an interest in the New York enterprise, and that I kept on paying until I found out he did not have 25 per cent. I did pay him all along upon the representation that he had 25 per cent.

Q. Now, "the property he turned over to you as security he got nothing for, as I understand, and the money he got from my landlord Lyon he knows that it was I who made it possible for him to get it. Otherwise, Lyon like the rest, would have paid him nothing." You wrote those lines, didn't you?

A. I did.

Q. And you signed your name to them?

A. Yes, sir.

Q. And so it was only possible for him to have gotten money through you from Lyon? That is what you mean? It is plain. Any man that runs can read. Isn't that so?

A. I don't think he could have made that deal without me.

Q. That is so plain that any man who runs can read that it was through you that he got the money from Lyon?

225 A. You can put such a construction on it as you want.
Q. What construction do you place on it?
A. I have explained it.
Q. You said it was plain so that everybody could understand it?
A. I think so.
Q. And you have said that it was by your suppression of the truth about this, keeping from Lyon the fact of your mortgage and of your deed, that this money was paid?
A. I didn't say that.
Q. You did not? Didn't you say here it was while these negotiations were pending, in your examination-in-chief a moment ago, that it was by keeping your mortgage off the record, and by your negotiations that you expected to accomplish a settlement with Mr. Lyon, and the result was that by these acts of yours he had no notice of your lien and paid the money?
A. I said I was withholding my rent.
Q. You said withholding your mortgage, too, didn't you so swear?
A. I think not, sir.
226 Q. You didn't? Did you not swear a minute ago that the mortgage was withheld so that your landlord wouldn't know anything about it?
A. Not in connection with that, I guess.
Q. Didn't you swear here, sir, that the purpose of keeping the mortgage of- the record was so that your landlord wouldn't know it?
A. I guess so.
Q. Now, then, if your landlord had known about it he would not have paid the money to Mr. Blackman, would he?
A. I presume he would not.
Q. Well, that is all.
A. I don't know whether he would or not. If the mortgage had been recorded I presume he would not.
Q. So then you sanctioned this whole proceeding in December, 1892, by crediting to yourself the fact that it was through your instrumentality that Mr. Blackman got the money from Mr. Lyon?
A. I think it was my position in the deal that got him the money.
Q. And you claimed what glory there was out of that transaction in your letter to Hoadley, didn't you?
A. I have not found very much glory in it yet.
Q. Well, you gloried over it in that letter, didn't you?

227 Objected to as impertinent, insulting to the witness, not cross-examination.

Q. Is that what you wrote, sir?
A. The letter states what I wrote.

(Witness excused.)

The letter of Dec. 15, 1892, addressed to George Hoadley, in which the following language is used, "The property that he turned over to you as security he gave nothing for, I understand, and the money he got from my landlord, Lyon, he knows that it was I who made it possible for him to get, otherwise Lyon, like the rest, would have

paid him nothing," I mailed and sent through the mails to Mr. Hoadley. (Here witness read this letter and says that the letter is correct.) I did receive a letter from Governor Hoadley in answer. I think I have it at home.

Q. Isn't it a fact that Governor Hoadley's exception he took to that was this, he said to you that "until I received your letter I had always blamed Mr. Blackman for conveying the property to Lyon, but your letter has completely exonerated him"? Didn't he so state?

A. He said a part of that, but didn't say "completely" exonerated him.

The testimony of Mrs. G. P. Kronk is not in appellants' abstract at all.

228 Mrs. G. P. KRONK,

being sworn and examined by Mr. Duffie, testified as follows:

Live in Omaha, and am acquainted with Mr. Blackman and Mr. Haldane. I am a stenographer and typewriter. I worked for Blackman in his office in New York. I know Mr. Dull, who sits there. I was with Blackman and Haldane the last week in August, 1889, and remained there until the following April. Mr. Dull was negotiating with them for a certain part of the Broadway property. Dull was in the office frequently, almost every day. The deeds and papers that were procured by Blackman from the heirs of the Hopper estate were put in a tin box and locked up in the evening and taken somewhere for safe keeping and deposit and returned in the morning, and the box was always opened in the morning. I have seen Dull examining those papers occasionally. I wrote out a great many papers for them and Mr. Haldane always acted as Mr. Blackman's attorney and signed the papers as Blackman's attorney.

Cross-examination:

I did work for both of them; wrote letters and contracts. I have been through this box and know what it contained.

Page 166, middle: The following paragraphs in letter of Daniel Dull to George Hoadley are omitted in appellants' abstract:

229 He (Blackman) succeeded for the time in his attempt upon me, but he, I think, did not succeed with Haldane, and on account of some misunderstanding with Haldane I learn that Mr. Blackman refuses to proceed further with the suits.

One of the confidence games that he played on me was that the suits must all be commenced before the 17th day of July last and unless they were commenced before that date it would be a serious matter, although possibly not fatal. This he continually brought before me when he wanted money; also that I would do all in my power to harmonize Haldane and get him to make terms. Haldane finally agreed to finish making out the necessary papers to bring the suits for $25. I handed this amount to Blackman to convey to Haldane. Blackman gave Haldane $10, kept the balance and told Haldane

that he could only get from me the $10, so Haldane states, and when Haldane learned the fact he wrote Blackman demanding his money, but I believe did not get it or any reply. I mention this to show you what Blackman will do for $15.

Now, all that he (Blackman) really wants is protection in his methods and support for his different families, if he still has more than one, the expense of the suits sustained, the necessary influence to overcome the prejudice on account of the nature of the suits, together with the prejudice justly due himself in his position with his altogether too well-known methods, and that he holds a large interest, control the matter, be able to say that when his whims or unscrupulous methods are not sustained or objected to, that the
230 enterprise will stop or start at his will, while neither prejudice nor his agreement entitles him to such interest. Besides, I think his place is in the background, out of sight, for his presence in court is apparently obnoxious and injurious.

I learn from Haldane that a contract was made and that Blackman is finding some fault with it. In my opinion if anything further is done, it will be necessary to first bring the suits, make Blackman fulfill his agreement and settle for all his irregularity as far as is possible for him to do; then put him in the background where he belongs, as it is evidently injurious to any case for him to be either seen or heard in connection with the same.

E. R. DUFFIE AND
WRIGHT & BALDWIN,
Attorneys for Appellees.

231 Said cause was submitted to the supreme court of Iowa on the foregoing record at the October, 1895, term of said court, and on the 21st day of January, 1896, said court filed its written decision (opinion), the same being in the words and figures following, to wit:

232 "In the Supreme Court of Iowa.

JAN. 21, 1896.

JOHN E. BLACKMAN, Appellee,
vs.
GEORGE F. WRIGHT *et al.*, Appellees; DANIEL DULL and NELLIE M. DULL, Appellants.

Appeal from Pottawattamie district court—Hon. H. E. Deemer, judge.

Flickinger Bros., for appellants.
Wright & Baldwin and Winfield S. Strawn, for appellees.

KINNE, *J.*:

1. The pleadings in this case are elaborate and the facts are many and somewhat complicated.

A thorough understanding of the case and of the grounds upon which our conclusions rest demand a quite full statement touching

the matters in controversy. In 1887 plaintiff, a resident of the State of Nebraska, became acquainted with some of the heirs of one
233 John Hopper, who died in the State of New York in 1706.

These Hoppes heirs, some two hundred in number, claimed an interest in certain land fronting on Broadway, in the city of New York. This claim seems to have been based upon the fact that in 1703 the Bloomingdale road, in said city, had been laid out upon land belonging to said Hopper, which road was in 1847 so widened and straightened as to leave a strip of ground lying between the lots fronting upon the old road and the east line of the new road (called Broadway), which, in accordance with an act of the legislature of New York, reverted to the owners of the abutting lots.

Plaintiff undertook for a half interest therein to recover this property for some of the Hopper heirs.

In 1888 plaintiff interested E. R. Duffie, an attorney, residing in Omaha, Neb., in his venture, and Duffie went to New York city and spent some time in investigating the records, titles, etc. For his services in this behalf Duffie afterwards demanded over $5,000.

Thereafter plaintiff made an arrangement with Charles Haldane, then of Council Bluffs, Iowa, and a member of the firm of Wright, Baldwin & Haldane, whereby Haldane was to share equally with plaintiff in the enterprise, and was to and did go to New York city to investigate the matter, to procure deeds from the Hopper heirs, and to prosecute suits in furtherance of their joint venture. Haldane for some time after his removal to New York city continued his firm relations with Wright and Baldwin, who were also interested in the contract with plaintiff.

Plaintiff and Haldane in the course of their investigations found that Daniel Dull, the defendant herein, was in pos-ession of a portion of the strip of land on Broadway, heretofore mentioned, which plaintiff claimed was the property of these Hopper heirs. Dull was a tenant of one Lyon, who held title to the land. Twenty-four feet of the Broadway front of his premises *was* embraced in this disputed tract.

Dull had erected a building upon this land, and by the terms
234 of his lease his landlord had an option at a certain time to take the building and pay Dull $22,000 for it.

The lease required Dull to erect a building to cost not less than $25,000, but in fact the building had cost $45,000.

In 1889 plaintiff and Haldane met Dull and proposed to sell him the strip of ground belonging to the Hopper heirs.

Dull informed them that he was only a tenant. Dull knew Wright. The time when Lyon, the landlord, might exercise his option was near at hand and Dull was anxious to unload the building onto his landlord for $35,000.

He apparently saw in the proposition of Haldane and plaintiff the opportunity to further his designs in that direction and entered into negotiations with them for the purchase of the interest which they represented in this disputed strip of ground which he was occupying. His object, no doubt, was to acquire the control of the Hopper title and thus force his landlord to his terms. The result

of the negotiation was that on June 28, 1889, Dull conveyed to plaintiff by warranty deed five hundred and fifty-one acres of land in Pottawattamie county, Iowa, and was to remove therefrom a mortgage for ten thousand dollars which covered the tract of land conveyed and other lands.

He never did remove this incumbrance.

As a part of the deal Blackman executed to Dull a quitclaim deed to this disputed strip of ground which the latter was occupying as a tenant, which was placed in *escrow* with one King, who was a solicitor for Dull in New York city.

As a part of the same transaction Blackman gave Dull a mortgage on said disputed strip for $10,000, which was delivered to Dull. It is not clear as to how long this deed was to be held in *escrow;* probably, however, until Dull secured a settlement with his landlord or until it was determined in the litigation which was expected to follow that Blackman had title to the land. Dull, Blackman, and Haldane then set about getting the landlord to purchase the brick building which Dull had erected upon the lot, and also were going to convey to the landlord the title which Blackman had discovered to be in and had acquired from the Hopper heirs.

There can be no doubt that so far in these negotiations Blackman and Haldane were acting as agents for Dull.

Lyon, the landlord, however, did not accede to their demands.

Dull all of this time had kept from his landlord the knowledge that he, Dull, already had a mortgage on the disputed ground.

Finally, either Blackman or Haldane, or perhaps both, without Dull's knowledge, sold to the landlord for $10,000 the same strip of land which they had theretofore mortgaged to Dull.

It is proper to say that when Dull entered into negotiations with Blackman and Haldane he claims that Blackman represented to him that he, Blackman, was a man of means; that he had then eighty-six per cent. of the Hopper title, and that he would prosecute the matter with due diligence against the occupants and owners of the strip. This claim is not acceded to by Blackman. Prior, however, to deeding this strip to Lyon, the landlord, and on August 8, 1889, Blackman had conveyed the Iowa land received from Dull by warranty deed to George F. Wright, of the firm of Wright, Baldwin & Haldane; which deed was duly recorded. Blackman claims that this deed was made under an arrangement whereby Wright was to advance not exceeding $10,000 to further the enterprise. Wright and Baldwin claim this deed was to secure about $5,000 already advanced to Haldane, as well as money afterwards to be advanced.

It is reasonably clear from the evidence that little, if any, money was advanced by them to Blackman after this deed was executed.

Wright mortgaged the land to Askwith, a clerk in his office, for $5,500. The latter, however, never advanced any money, the mortgage being made to enable Wright to raise money from other parties. Oct. 1, 1889, Blackman conveyed the same land by warranty deed,

for a consideration of $15,000, to one Savage, of Omaha, and
236 Jan. 1, 1891, Savage reconveyed it to Blackman. Jan. 30, 1892, Blackman conveyed the same land to one Phelan, of Omaha, by warranty deed; which conveyance seems to have been originally made to secure a small loan of $75.00.

Aug. 27, 1892, Phelan mortgaged the land to Duffie for $5,500 to secure payment of his fees as for attorney for services which he had rendered Blackman. On Sept. 15, 1892, it was agreed between Blackman and Phelan that this deed to the latter should convey absolute title, and that Phelan should pay Wright his claim for money advanced Haldane, Duffie's claim, and a claim for some $1,000 or more held by Savage, of Omaha, against Blackman, and to pay Blackman $500 and to do certain other acts in the premises.

Sept. 22, 1892, Dull deeded this Iowa land to his wife, Nellie M. Dull. In Feb., 1892, Blackman began this action against Wright alone to cancel the deed he had made to Wright.

Blackman then went to Chicago and wrote Dull to meet him there with a view of settling their troubles. Dull met him, and Duffie was also present.

From 1889 to 1892 Dull seems to have been advancing money to Blackman and Haldane to meet their necessities and to aid them in prosecuting their claims.

There is dispute in the testimony as to whether a settlement was in fact reached in Chicago between Dull and Blackman.

That some sort of an agreement was made between them or was consummated after they both returned to New York seems manifest from the fact that Dull kept on advancing money to them, no doubt on the faith also that he would have an interest in the Hopper title generally, as the evidence strongly tends to show. Dull admits that he was to stand by Blackman in the prosecution of his suit against Wright for the recovery of the land and claims Blackman agreed to reconvey it to him.

Blackman and Haldane fell out and Dull undertook to reconcile their differences. Finally he determined that they were simply using him for the purposes of extorting money; that Black-
237 man's representations were untrue, and ascertained that he had in the Iowa case amended his petition, asking to have his title quieted as against Dull as well as against Wright.

Thereupon he appeared in this case and filed an answer and cross-petition. On Nov. 3, 1892, Dull began suit in Westchester county, N. Y., to set aside his deed which he had made to the Iowa land, and in said suit an injunction was issued. In this suit Blackman and his wife, Wright, Askwith, Phelan, and Duffie were all made parties defendant.

Blackman only was served in the State of New York, Wright and Askwith were served in Council Bluffs, and Duffie and Phelan in Omaha. None of the defendants save Blackman and wife ever resided in the State of New York.

Blackman appeared in the New York suit and made defense. The other defendants never appeared.

In this suit a final decree was entered setting aside the conveyance

from Dull to Blackman and ordering a reconveyance of the property, and enjoining each of the defendants from prosecuting this action or conveying or encumbering said land.

The decree is pleaded in this action by Dull as an adjudication against all of the defendants.

Such pleadings were filed by the various parties that the following issues were presented for the determination of the trial court in the cause at bar.

1. Alleged fraud of Blackman practiced on Dull in representing that he, Blackman, had eighty-six per cent. of the title of the Hopper heirs, it being claimed in fact that he held only fifty-four per cent.

2. That Blackman reported that he was a man of means and able to prosecute the litigation in New York. It is said that this is untrue and that Blackman was insolvent.

3. That there was a failure of consideration for the deed from Dull to Blackman, and hence it should be set aside.

4. The effect of the decree pleaded.

The district court entered a decree that if the mortgagee, Holcomb, elected to foreclose he should first exhaust the lands embraced
238 in his mortgage, which are not in controversy in this action; that the deeds from Blackman to Wright and from Dull to his wife be set aside and cancelled.

That the mortgage made by Wright to Askwith be cancelled.

That the title to the lands be quieted in the intervenor Phelan as against the plaintiff and all defendants and other intervenors, and that Phelan be decreed to be the absolute owner of the land, subject only to the rights of Holcomb to satisfy his mortgage out of said land after first exhausting the other lands covered thereby; also subject to the mortgage held by Duffie and the claim for $1,000 held by Savage.

The defendants Dull alone excepted and appeal.

2. As Dull and wife only appeal, we are conserned only with the question as to whether such fraud was practiced upon Dull by Blackman as to warrant the setting aside of the conveyance of the Iowa lands by the former to Blackman; and, of so, whether the other claimants to this land took their title with notice of the fraud or with knowledge of such facts as should be held to put them upon inquiry touching it.

Passing for the present the consideration of the effect of the New York judgment, what evidence is there of fraud?

The first item of fraud charged by Dull is that Blackman represented to him that he owned eighty per cent. of the Hopper title, when in fact he had only fifty-four per cent.

Blackman denies making any such representations.

Haldane testifies that Blackman only had fifty-four per cent. of the title. Dull's claim in this respect cannot be said to be established unless we may consider Haldane's evidence.

Now, Haldane's knowledge as to Blackman's title was derived only from Blackman himself or from papers which Blackman had placed in Haldane's possession. At this time Haldane was Black-

man's attorney. The information which Haldane had touching this matter was obtained confidentially and in his professional capacity to enable him to properly perform his professional duties on behalf of his client. Haldane's evidence cannot therefore be considered.

239 Code, section 3643.

Dull also testifies that Blackman represented that he was a man of means and had land in Nebraska.

So far as we can discover from the record, there is no evidence whatever that Blackman did not have the Nebraska land, nor is there any evidence that he was not a man of means, unless it be implied from the fact that he was often borrowing money. The mere fact that Blackman borrowed money shortly after this deal with Dull is no evidence of insolvency.

Were it otherwise it would not be a difficult matter to establish the fact that one-half of the men in every community were insolvent, because they were borrowers of money.

We conclude, then, that the alleged fraud has not been established by a preponderance of the evidence, unless the decree of the New York court is conclusive upon that question.

3. The decree of the supreme court of New York is pleaded as a complete adjudication of the rights of the parties in this controversy and as a bar to the prosecution *to* this suit.

Now, if it in fact be such, than it is clear that the decree in the court below in this case should have been in favor of the Dulls. Before entering into a discussion as to the legal effect of this New York decree, it will be well to ascertain just what the court undertook to do by it. 1. It ordered Blackman to execute a deed to Dull, conveying the Iowa lands; and, 2, it enjoined all of the defendants in that proceeding from prosecuting this action in Pottawattamie county, Iowa, affecting title to said lands; and, 3, it enjoined said defendants from conveying or encumbering said lands.

It would appear that this decree is one *in personam* and not *in rem*. It does not purport to act upon the subject-matter of this suit—the land.

True, it directs a conveyance of the land by Blackman to Dull, but it nowhere provides for the making of any such conveyance in the event Blackman shall refuse to do so, and we think it cannot be held to settle the title to said land as between the parties

240 now contesting the same.

Another thing of interest about this decree is the fact that by it relief is undertaken to be granted to Dull long after the pleadings and evidence in the case show that he had parted with all his interest in the land, nor was his grantee, the real party in interest, substituted in said suit.

The New York suit was instituted by Dull on Nov. 3, 1892.

The decree therein was entered in May, 1893. Now, Dull had conveyed the land to his wife many months before this suit was instituted. He did not have the legal title when he began the suit or when the decree was entered.

How a decree, entered under such circumstances, in favor of Dull could confirm the title in him to land the title to which was by his voluntary and unimpeached act placed in another person is difficult to understand. It is contended, however, that Dull, having executed to his wife a deed with covenants of warranty, might properly prosecute an action to reinvest himself with the title to the land.

We do not find it necessary to determine that question.

4. Now, it will be remembered that neither Phelan, Wright, Askwith, Savage, or Duffie resided within the State of New York, neither of them were served in that State, and neither of them appeared in that action.

Before Dull began that action Blackman, his grantee, had deeded this Iowa land, first to Wright and afterwards to Phelan.

So that when the New York suit was instituted, as well as when the decree therein was entered, the legal title to the land was either in Dull's wife or in Phelan or Wright.

The grantees of Blackman, as we have seen, were at no time within the jurisdiction of the New York court.

The land was not within its jurisdiction. The only defendant within its jurisdiction had deeded the land to parties in Iowa, thereby divesting himself of all interest in it.

Dull, then, by his New York decree got nothing, obtained no rights, at least as against any one save Blackman.

241 The latter's grantees, having acquired title long before the New York suit was instituted, could not be effected by the decree thus rendered therein. Under our law, in such a case to affect the title to this land, even if suit had been instituted in this State, it would have been necessary to have made Blackman's grantees parties defendant.

They were made parties defendant, but were not within the jurisdiction of the New York court, and are therefore wholly unaffected by its decree.

Swan *vs.* Clark, 36 Iowa, 560.

Now, counsel for appellant argue with great zeal that the New York decree was binding as between Dull and Blackman, and place stress upon the cases of—

Massie *vs.* Watts, 6 Cranch, U. S., 148.
Burnley *vs.* Stephenson, 24 Ohio St., 474.
Mills *vs.* Duryea, 7 Cranch, U. S., 481.
Hampton *vs.* McConnel, 3 Wheaton (U. S.), 234.
Gilliland *vs.* Inabint, 60 N. W. Rep. (Ia.), 211.

Now, a consideration of some of these cases will serve to show that they are not applicable to the case at bar.

The leading case, which all others follow, is the Massie case.

That was an action to compel Massie to convey to Watts lands located in the former's name, but within a location made under a land warrant owned by O'Neal and assigned to Watts, and which was placed in Massie's hands as a common locator of lands.

These lands lay in Ohio and the action was brought in the State of Kentucky, where the parties resided.

Clearly, here was a case of trust created, and the court decreed that Massie, in whom the title vested, should convey to Watts. The decree of itself did not act upon the land; it simply provided for the doing — an act by the party which, when done, would operate to transfer the title.

If Massie refused to obey the decree, he might be punished for contempt, but the title would remain as before.

242 In the Kentucky case it was held that the action was not *in rem*, but *in personam*, for the purpose of enforcing a personal obligation of contract or trust.

And so it is said in Hart *vs.* Simpson, 110 U. S., 155: "It is clearly not a judgment *in rem*, establishing a title in the land, but operates *in personam* only." And in the same case, in speaking of the equity power of the court, it is said: "It has no inherent power by the mere force of its decree to annul a deed or to establish a title."

See McGregor *vs.* McGregor, 9 Iowa, 65.

Without further discussing this phase of the question, we conclude that this New York judgment is not binding upon these parties, who were not within this jurisdiction, so as to effect the title to land in this State, and we need not determine as to whether that judgment was effective as against Blackman.

Much more might be said in this connection and a multitude of authorities cited, but it is not necessary so to do.

5. We have said that fraud on the part of Blackman has not been so established as to warrant a court in setting aside the conveyance made by Dull to Blackman.

That conclusion is decisive of the case, and we might rest our judgment upon it alone. There are, however, reasons which show that even if fraud had been established, still Dull is not in a situation to take advantage of it.

It may be profitable to briefly consider some of them.

It is elementary doctrine that one who would rescind a contract on the ground of fraud should act promptly.

Now, what did Dull do? He confesses that on October, 1889, or shortly thereafter, he knew that Blackman had quitclaimed to Dull's landlord the very tract of land on Broadway which he had previously sold to Dull. Did he then take such steps as a man ordinarily would who had discovered that a gross fraud had been

243 practised upon him? He proceeded to advance money to Blackman and Haldane to aid them in prosecuting their claims; he goes to Haldane to get the deed which was deposited in *escrow*, and which King had turned over to Haldane, and which the latter had destroyed. He procures Haldane to make an affidavit as to its loss; at the interview in Chicago he asks Duffie touching his situation with reference to his claim against this New York property, and is told that as his landlord holds by a quitclaim deed, he, Duffie, thinks his mortgage and his claim is a better claim than that of his landlord.

Dull appears to have acted upon this advice to the extent of putting himself in a position to prove the execution of the deed. He evidently then had no thought of setting aside his deed to Blackman for the Iowa land.

He admits that about two weeks after he left Chicago he and Blackman "came to some sort of an understanding" touching Blackman's proposition to give Dull an interest in the New York enterprise.

And, though he claims no settlement was made between him and Blackman, he admits he advanced the latter about three thousand dollars thereafter. Dull's whole course of conduct after his discovery of the alleged fraud, and which is evidenced by many acts of his, was only consistent with the theory that he expected to have an interest with Blackman in the New York enterprise, and to prosecute his claim against his landlord for his interest in the title to the Broadway property, which he, Dull, occupied as a tenant.

If such was not his intent, then he was speculating as to whether he could thus realize the most for himself or whether he might in the end, if it seemed more desirable, resort for relief to his action to set aside his deed to Blackman.

Such a course is not consistent with the duty of one who claims to have been defrauded to promptly act in the premises.

He cannot be thus permitted to play fast and loose.

His own conduct is inconsistent with his present claim.

After sleeping upon his rights, if he had any, for over three
244 years, he is in no situation to complain if relief is not granted to him.

6. Very many other matters are discussed by counsel, such as the effect upon Dull of his failing to record his mortgage on the New York property; whether Phelan was a good-faith purchaser of the Iowa land; whether Savage and Duffie are in a situation to be protected as was done by the court below.

Now the length of this opinion precludes the separate discussion of these and many other questions raised by the counsel.

We have examined all of them and we are fully satisfied, in every particular, with the decree rendered by the district court.

The conclusion we reach is that whatever may be the real merits of Dull's claim he has failed to establish it by the evidence; that his conduct, even if he had established his claim, has been one of acquies-ence in the alleged fraud and utterly inconsistent with the thought that he expected to exercise a right to rescind his contract of conveyance, and that Phelan, Savage, and Duffie have acquired interest in the Iowa land which, under the circumstances, should be protected.

Appellee's motion to strike the denial of their abstract is overruled. The decree, therefore, of the district court is in all respects affirmed.

Deemer, J., having tried this case below, takes no part in its consideration in this court."

And on the same day a final judgment was rendered in said supreme court, and the following is a true and correct copy of the record thereof, to wit:

245 "JOHN E. BLACKMAN *vs.* GEORGE F. WRIGHT *et al.*, DANIEL DULL, and NELLIE M. DULL, Appellants. } Appeal from Pottawattamie Dist. Court.

In this cause the court, being fully advised in the premises, file their written opinion affirming the judgment of the dist. court.

It is therefore considered by the court that the judgment of the court below be, and it is hereby, affirmed, and that a writ of *procedendo* issue accordingly.

It is further considered by the court that the appellants Daniel Dull and Nellie M. Dull pay the costs of this appeal, taxed at $104.75, and that execution issue therefor."

245½ And afterwards there were filed in the office of the clerk of said court a petition for writ of error, writ of error, bond, citation, and assignment of error, the originals of which are hereto attached as a part of this transcript and true and correct copies thereof have been retained in said clerk's office.

246 Filed Jun- 2, 1896. C. T. Jones, clerk supreme court.

In the Supreme Court of Iowa.

JOHN E. BLACKMAN, Appellee, *vs.* GEORGE F. WRIGHT, E. R. DUFFIE, and ED. Phelan, Intervenor, Appellees; Daniel Dull and Nellie M. Dull, Appellants. } Petition for Allowance of Writ of Error.

To the honorable judges of the supreme court of Iowa:

The defendants and appellants in the above-entitled action, Daniel Dull and Nellie M. Dull, pray this court for the allowance of a writ of error to the Supreme Court of the United States for the reason that a Federal question is involved therein, viz:

1st. Whether or not, in disregarding the judgment and decree of the supreme court of New York offered in evidence, this court violated the provisions of section I, art. IV, of the Constitution of the United States.

2nd. Whether or not, in considering the judgment of the supreme court of New York and its effect upon the parties thereto, the court disregarded the provision of section 905 of the Revised Statutes of the United States.

FLICKINGER BROS.
Attorneys for Daniel Dull and Nellie M. Dull, Appellants.

[Endorsed:] # 17568. Supreme court Iowa. John E. Blackman, appellee, *vs.* Geo. F. Wright *et al.*, appellees; Daniel Dull *et al.*, appellants. Petition for writ of error. Flickinger Bros., att'ys for appellants.

247 Filed Jun- 2, 1896. C. T. Jones, clerk supreme court.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the supreme court of the United States for the State of Iowa, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, between John E. Blackman, plaintiff, and George F. Wright, E. R. Duffie, Daniel Dull, Nellie M. Dull, *et al.*, defendants, and Ed. Phelan, intervenor, wherein was drawn in question a right or privilege under the Constitution of the United States and the decision was against such right or privilege so set up, a manifest error hath happened, to the great damage of the said Daniel Dull and Nellie M. Dull, defendants, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 30th day of June, 1896, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Seal U. S. Circuit Court, Southern District Iowa.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 30 day of May, A. D. 1896.

EDWARD R. MASON,
Clerk U. S. C. C., S. Dist. of Iowa.

Allowed:
JAS. H. ROTHROCK, *Judge.*

248 Filed Jun- 2, 1896. C. T. Jones, clerk supreme court.

Bond.

Know all men by these presents that we, Daniel Dull and Nellie M. Dull, are held and firmly bound unto John E. Blackman, George F. Wright, E. R. Duffie, and Ed. Phelan in the full and just sum of two hundred dollars, to be paid to the said parties, their executors, administrators, or assigns.

Sealed with our seals this twenty-sixth day of May, one thousand eight hundred and ninety-six.

Whereas lately, at a term of the supreme court of the State of Iowa, in a suit pending between John E. Blackman, plaintiff, and Geo. F. Wright, E. R. Duffie, Daniel Dull, and Nellie M. Dull, defendants, and Ed. Phelan, intervenor, judgment was rendered

against the said Daniel Dull and Nellie M. Dull, and they having prayed for and obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said John E. Blackman, Geo. F. Wright, E. R. Duffie, and Ed. Phelan, intervenor, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington, D. C., on the 2nd Monday of October next:

Now, the condition of the above obligation is such that if the said Daniel Dull and Nellie M. Dull shall prosecute their writ of error to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; otherwise in full force and effect.

Dated May 27th, 1896.

DANIEL DULL AND
NELLIE M. DULL,
By FLICKINGER BROS.,
Their Attorneys.
W. E. HAVERSTOCK, *Surety.*

248½ STATE OF IOWA, } ss:
Pottawattamie County, }

I, F. L. Reed, clerk of the district court in and for said county and State, certify that the surety on the within bond *are* fully responsible for the amount named, and if presented to me I would approve and accept the same.

Witness my hand and the seal of said court this 26th day of May, 1896.

[Seal of the District Court, Pottawattamie Co., Iowa.]

F. L. REED,
Clerk District Court.

[Endorsed:] Bond. The within bond approved May 27, 1896 Jas. H. Rothrock, ch. justice sup. court of Iowa.

249 Filed Jun- 2, 1896. C. T. Jones, clerk supreme court.

Citation.

UNITED STATES OF AMERICA, ss:

To John E. Blackman, Ed. Phelan, E. R. Duffie, Geo. F. Wright, or to W. S. Strawn, E. R. Duffie, and Wright & Baldwin, their attorneys, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Iowa wherein John E. Blackman is plaintiff and George F. Wright Daniel Dull, Nellie M. Dull, E. R. Duffie are defendants, and Ed

Phelan, intervenor therein, and wherein Daniel Dull and Nellie M. Dull are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Des Moines, Iowa, this 28th day of May, A. D. eighteen hundred and ninety-six.

JAS. H. ROTHROCK,
Chief Justice of the Supreme Court of the State of Iowa.

We hereby accept service of the foregoing citation this 29th day of May, 1896.

WINFIELD S. STRAWN,
WRIGHT & BALDWIN,
Attorneys for Defendants in Error.

250 Filed Jun- 2, 1896. C. T. Jones, clerk supreme court.

In the Supreme Court of Iowa.

JOHN E. BLACKMAN, Appellee,
vs.
GEO. F. WRIGHT, E. R. DUFFIE, ED. PHELAN, Intervenor, *et al.*, Appellees; Daniel Dull and Nellie M. Dull, Appellants.
} Assignments of Error.

Come now Daniel Dull and Nellie M. Dull, appellants in the action above entitled, and allege that there is manifest error on the face of the record in this:

Assignments of Error.

1st. The court erred in paragraph 2 of the opinion in investigating the evidence of fraud between Dull and Blackman and holding that the fraud had not been established, for that the question of fraud had been expressly adjudicated and determined as between these parties by the supreme court of New York.

2nd. The court erred in paragraph 3 of the opinion in holding that the New York decree did not settle the title to the Iowa lands as between the parties thereto.

3rd. The court erred in par. 4 of the opinion in holding that Blackman, at the time of the trial of the New York suit, had divested himself of all interest in the Iowa land.

4th. The court erred in par. 4 of the opinion that by the New York decree Dull obtained no rights as affecting his interest in the Iowa land.

5th. The court erred in par. 4 of the opinion in holding that the rights of Phelan and Duffie were not in any manner affected by the New York decree.

251 6th. The court erred in par. 4 of the opinion in holding *the* the New York court by its decree had no jurisdiction to affect the title or equities relating to the Iowa land.

7th. The court erred in par. 4 of the opinion in holding that unless a conveyance was made under the New York decree the title to the Iowa land could not be affected thereby.

8th. The court erred in par. 5 of the opinion in holding that Dull had acquiesced in the fraud of Blackman, for the reason that all the matters relating thereto had been expressly adjudicated by the New York decree.

9th. The court erred in par. 5 of the opinion in holding that Dull was concluded by laches and acqüiescence in the fraud of Blackman, for the reason that these matters, as well as all other matters in the controversy between Dull and Blackman, had been expressly adjudicated by the New York decree.

10th. The court erred in par. 6 of the opinion in holding that Dull, notwithstanding the adjudication of the New York supreme court, had been guilty of laches and acquiescence in the alleged fraud, and that by reason thereof was barred of any recovery.

11th. The court erred in holding in par. 6 of the opinion that Phelan, Savage, and Duffie were in no manner affected by the New York decree.

12th. The court erred in holding in par. 6 of the opinion that Phelan, Savage, and Duffie had acquired interests in the Iowa land which entitled them to protection.

13th. The court erred in holding under the pleadings and evidence that Phelan, Savage, and Duffie had any other or different interests in the Iowa lands than their fraudulent grantor, Blackman.

14th. The court erred in refusing to give to the decree of the supreme court of New York the full faith and credit to which it was entitled under section I, article IV, of the Constitution of the United States.

15th. The court erred in refusing to give to the decree of the New York supreme court the full faith and credit to which it was entitled under section 905 of the Rev. Statutes of the United States.

16th. The court erred in not entering up a decree in favor of appellants as prayed in their cross-petition.

FLICKINGER BROS.,
Attorneys for Daniel Dull and Nellie M. Dull, Appellants.

[Endorsed:] # 17568. Supreme court Iowa. John E. Blackman, appellee, *vs.* Geo. F. Wright *et al.*, appellees; Daniel Dull *et al.*, appellants. Assignments of error. Flickinger Bros., att'ys for app's.

252 STATE OF IOWA, *ss:*

I, C. T. Jones, clerk of the supreme court of Iowa, hereby certify that the foregoing is a full, true, and correct transcript of the record, decision (opinion), and final judgment in said supreme court in the foregoing-entitled cause as full, true, and complete as the same are of record in my office.

I further certify that I have retained in my office true and correct copies of petition for writ of error, writ of error bond, citation, and assignment of error, and that the originals thereof are hereto attached and made a part of the return to said writ, and this return is made in obedience to said writ of error.

In testimony whereof witness my signature and the seal of said court, at Des Moines, Iowa, this 3d day of June, 1896.

Seal of the Supreme Court Iowa.

C. T. JONES,
Clerk Supreme Court of Iowa.

Endorsed on cover: Case No. 16,324. Iowa supreme court. Term No., 192. Daniel Dull and Nellie M. Dull, plaintiffs in error, *vs.* John E. Blackman, Ed. Phelan, E. R. Duffie, & George F. Wright. Filed June 23rd, 1896.

In the Supreme Court of the United States.

October Term, 1897.
No. 192.

Daniel Dull and Nellie M. Dull,
Plaintiffs in Error,

vs.

John E. Blackman, Edward Phelan, Edward R. Duffie and George F. Wright,
Defendants in Error.

Error to the Supreme Court of the State of Iowa.

MOTION TO DISMISS OR AFFIRM.

Come now Edward Phelan, Edward R. Duffie and George F. Wright, the only defendants in error served with the citation in the above entitled cause or appearing thereto, and by their counsel appearing in that behalf, move the court to dismiss the writ of error in said cause, for want of jurisdiction, because:

The judgment from which the said writ of error purports to have been taken, was rendered on various and different issues raised, and on matters and questions involved, other than the alleged Federal question, to-wit:

(a.) Alleged fraud of Blackman in obtaining from Dulls the conveyance by them to him of the Iowa lands:

(b.) Alleged failure of consideration for making said conveyance:

(c.) Dull's failure to restore or offer to restore what they had received as the consideration for making

said conyeyance, and to restore the parties to the same situation that they occupied before the said conveyance was made:

(d.) That Dulls were estopped by a settlement they made with Blackman, knowledge of which was communicated to Phelan and Duffie, who acquired their rights in said Iowa land in reliance on such settlement:

(e.) Laches of Dulls in not seasonably prosecuting their alleged rights.

Each and every one of which said issues, matters and other grounds of said decision were independent of and did not involve the alleged Federal question. and were broad enough to support the judgment given, without reference to the alleged Federal question; and said judgment could have been given without deciding the alleged Federal question and a decision thereof was not necessary to the judgment given in favor of these defendants; and said judgment does not rest on said alleged Federal question or the decision thereof.

And the said defendants in error, by counsel as aforesaid also move the court to affirm the said judgment or decree from which the said writ of error purports to be taken, for the reason that although the record in said cause may show that this court has jurisdiction in the premises, yet it is manifest that the question on which the jurisdiction of this court depends is so frivolous as not to need further argument.

(Signed) Wm. J. Strawn

Counsel for Edward Phelan, Edward R. Duffie and George F. Wright.

Defendants in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1897. No. 192.

Daniel Dull and Nellie M. Dull,
Plaintiffs in Error,

vs.

John E. Blackman, Edward Phelan, Edward R. Duffie and Geo. F. Wright
Defendants in Error.

Notice of Motion.

To Isaac N. Flickinger, Esquire:

Counsel for Plaintiffs in Error:

Please take notice that on Monday, December 6th, 1897, at the opening of the Court or as soon thereafter as counsel can be heard, the motions of which the annexed and foregoing are copies, will be submitted to the Supreme Court of the United States for the decision of said court thereon. Annexed hereto is also a copy of the brief of argument to be submitted with the said motions in support thereof.

(Signed) Wm. S. Strawn.

Counsel for Edward Phelan, Edward R. Duffie and George F. Wright.

Defendants in Error.

Due and legal service of the foregoing notice, with a copy of the said motion and copy of the said brief of argument in support thereof, hereby accepted and acknowledged.

Council Bluffs, Iowa, November 12, 1897.

(Signed.) ISAAC N. FLICKINGER,

Counsel for Plaintiffs in Error.

In the Supreme Court of the United States.

October Term, 1897. No. 192.

DANIEL DULL AND NELLIE M. DULL,
Plaintiffs in Error,

vs.

JOHN E. BLACKMAN, EDWARD PHELAN, EDWARD R. DUFFIE, AND GEORGE F. WRIGHT,
Defendants in Error.

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

ISAAC N. FLICKINGER, *for Plaintiffs in Error.*

WINFIELD S. STRAWN, *for Defendants Phelan, Duffie and Wright.*

BRIEF ON MOTION TO DISMISS OR AFFIRM.

THE MARGINAL FIGURES (THUS[100]) GIVE THE PAGE OF THE RECORD.

Statement of the Case:

In February, 1892, Blackman commenced suit against Wright in Pottawattamie county, Iowa,[1] to recover back 550 acres of land lying in that county, which land Dull had conveyed to Blackman June 25th, 1889; and Blackman had conveyed to Wright on August 2d, 1889. In September, 1892, Phelan intervened[3] in the suit, claiming the land by a conveyance thereof from Blackman, of date January 30th, 1892, which conveyance was at first conditional, but while said suit was pending it was made absolute.[3a] Blackman's petition was then amended and Dulls were made parties to it and to Phelan's intervention. From thence on Blackman dropped out of the case and Phelan was the real

plaintiff.[100] On February 2d, 1893, Dull and wife appeared in the suit;[12] and on the 15th of that month answered[13] by general denial, and that they had a suit then pending in the courts of New York on the same issues as those presented in the case at bar. With said answer they filed their *cross-petition*,[14] alleging that in June, 1889, Dull owned the Iowa land in controversy; that Blackman, with intent to cheat and defraud Dull out of said Iowa land, had represented to Dull that Blackman owned 85 per cent of the title to the lot at Broadway and 51st streets in the city of New York; that Blackman was a man of means who could and would enforce his said claim of title to said lot; that Dull relying upon said representations, and in consideration of receiving said Broadway lot, had deeded the Iowa land to Blackman; that Blackman's said representations were false; that he did not have 85 per cent of the title; and that he was not a man of means and able to enforce his said claim of title, and that the consideration of the conveyance by Dull had failed. Dulls made Phelan and Duffie parties[16] to their said cross-petition, claiming that the deed to Phelan and the mortgage to Duffie, both on the Iowa land, had been taken with knowledge of Dull's alleged claims thereto. *On these various grounds* Dull's prayed *affirmative* relief.

In May, 1893, Dulls amended their said cross-petition[17] and alleged that the New York suit had gone to judgment in their favor and constituted "a complete adjudication" of the controversy in the Iowa courts and was a "bar" to its further prosecution. By a further amendment of their cross-petition[20] on July 11th, 1893, Dulls alleged that Blackman had, subsequent to Dull's deeding to him the Iowa land, deeded the Broadway tract *to Dull's landlord*, one Lyon who had long previous rented that very tract to Dull; that the consideration for Dull's deed for the Iowa land had failed,

and that Wright's Duffie's and Phelan's interests in the Iowa land were ficticious, and that said parties had conspired to defraud Dulls out of the said Iowa land. Dulls prayed for the cancellation (1) of their deed to Blackman for the Iowa lands and (2) of Blackman's deed to Wright therefor; (3) of Blackman's deed to Phelan; (4) of Wright's mortgage to Askwith, and (5) for the quieting of their (Dulls') alleged title to the Iowa land. No prayer for the cancellation of Duffie's mortgage was made. A copy of the alleged New York decree was set out as an Exhibit.[18]

Wright, Phelan and Duffie each[21 to 28] answered Dulls' cross-petition, denying all its allegations; and each denied any jurisdiction of the New York court, either over them or over the land in controversy; denied having ever been in the State of New York while said suit was pending; denied ever being served with any notice of said suit, except by the delivery of an alleged summons to them in the State of Nebraska; and each denied that he had ever in any manner appeared in or to the alleged suit in New York. Duffie and Phelan both pleaded as an estoppel against Dulls that a settlement of all matters in dispute and of all Dull's claims in or to the Iowa land was had between Dull and Blackman, and that they then communicated that fact to Duffie, who took his mortgage in reliance thereon; and communicated the fact of the settlement to Phelan, who took his deed absolute in reliance thereon; and that when Dull deeded the Iowa land to Blackman, the former took from Blackman a note for $10,000.00, and, to secure the payment of the same, took a valid mortgage on the said Broadway tract; and also had a deed therefor from Blackman to him (Dull) made and delivered in *escrow;* and that Dull neglected to place his said mortgage on record and thereby made the opportunity for Blackman to convey his interest in said Broadway lot

to Lyon (*from whom Dull was then renting the premises*) without notice of Dull's rights under the mortgage. They further pleaded that Dull had not returned or offered to return either the $10,000.00 note and mortgage made to him by Blackman on the Broadway tract or the deed for it.

It will thus be seen that the cause, so far as Dulls were concerned, and as it went to the Supreme Court of Iowa, and so far as it comes to this court, was made and tried on the affirmative allegations of Dull's cross-petition and the answer and defenses of Phelan, Duffie and Wright *(but not Blackman)* thereto, and that the decision was against Dulls on each and *all* of the several issues and matters involved.

After a trial of the various issues on the evidence in the case, the District Court entered its decree,[105] finding the facts to be that on June 25th, 1889, Dull owned the Iowa land in controversy; that on that date he duly conveyed it with warranty to Blackman, and received from Blackman his note for $10,000.00, secured by a mortgage on the Broadway lot; that on August 2d, following, Blackman conveyed the Iowa lands to Wright for $10,000.00 to be advanced, but that no money was in fact advanced; that January 30th, 1892, Blackman deeded the land to Phelan as security for money advanced him by the latter, and as further security for $5,500.00 due from Blackman to Duffie, and as security for $1,000.00 which Blackman owed one Savage, and that on September 14th, 1892, Phelan fully purchased said land from Blackman and the deed of January 30th, 1892, by a written agreement,[38] became absolute, but that the land remained subject to Duffie's and Savage's claims; that in October, 1889, Blackman quit claimed away to one, Lyon, the Broadway lot which he had mortgaged to Dull, and for which he had made to Dull a deed in *escrow;* that since the

commencement of this suit, and prior to the commencement of the New York suit, Dull had deeded the Iowa lands to his wife Nellie M; that in February, 1892, Blackman and Dull fully settled the dispute between them as to the land in controversy in this action, Dull taking an interest in the speculation in other realty in New York City and in the State of New Jersey, which Blackman laid claim to as assignee and grantee of Hopper's heirs; and that both of them communicated to Duffie the fact of the settlement, and in reliance thereon Duffie took his mortgage for $5,500.00 on this Iowa land; and that in the same reliance Phelan took title as absolute owner; and that Blackman and Dull returned to New York and acted on their said settlement; and that Dull never returned or offered to return either the $10,000.00 note or the mortgage made to secure the same, or the deed placed in *escrow* for the Broadway tract; that all the acts of Blackman, claimed by Dull as frauds on him, were well known to him shortly after the same occurred and long before Blackman conveyed the land to Phelan, yet that Dull took no steps to assert title to said land or to annul his conveyance thereof to Blackman, until the filing of his cross-bill in this case, which was some three years and more afterwards.

It was ordered that the deed of Blackman to Wright, and Wright's mortgage to Askwith, be cancelled, and the title to the land be quieted in Phelan, subject to Duffie's mortgage and Savage's claim; and Dull and wife appealed to the Supreme Court of Iowa;[108] which court, under the provisions of the Constitution of that State, (Art. V. § 4) tried the cause *de novo*, and found *the facts* as well as decided the law of the case. Said court in an opinion[127] written and filed as required by law (Code § 143 and § 3205) affirmed "in all respects" the said decree of the district court. Of said court's

findings of some facts and its specific approval of others as found by the district court,[105] and its decision on questions of fact and issues other than the alleged Federal one, and the sufficiency of its decision on such other questions, to sustain its judgment, without reference to the alleged Federal questions, we will speak further in our brief.

BRIEF.

I. *On the Motion to Dismiss.*

Of the parties defendant hereto we may here say that as Wright and Askwith were, by the decree of the State court,[107] cut off from all interest in and claim to the Iowa land and have not appealed or complained of said decree, it is not quite clear why Wright should be made a party to the proceedings in this court. As to Blackman, he was not at the time Dulls appeared and filed their cross-bill[18] (which was Feb'y 15, 93) a party to the suit, but *prior to all that*, and on January 26th, 1893, he had been formally dismissed from the case and Phelan substituted as plaintiff.[100] No one objected to this, and Dulls *did not appear* in the case till February 2d, 1893,[13] or a week after Blackman's *formal* connection had ceased.

His *actual* connection with the case had ceased on Sept. 14, 1892, when the conditional conveyance to Phelan had been made absolute[38] and this, it must be borne in mind, was prior to Dull's commencing his pretended suit in New York, which was Nov. 4, 1892;[42] and even prior to Dull's parting with all his alleged interest in the land to his wife, which was on Sept. 22, 1892.[81] There was no decree *as to him* either in the District Court of Pottawattamie county, or in the Supreme Court of Iowa. The decree herein complained of by the Dulls, is only between them and Phelan, Duffie, Wright, Farrar, Tefts, Askwith and Holcomb.[107] And in decreeing costs he is not even mentioned.

Dull's intervention, *after Blackman was dismissed from the suit*, alone raised the issues which are sought to be litigated here. And that they knew that Blackman was not in the suit then or at the time of trial in the lower court, is shown by the recitals in a stipulation which Dulls themselves offered in evidence at the trial as evidence on their own behalf and which reads: "*The substituted plaintiff* and intervenor Ed. Phelan consents," etc.[80] Blackman took nothing by the decree; did not appear in the Supreme Court of Iowa, does not appear in this court and was not served with any process in this cause. There was no question made in the State court of whether or not *he* was bound by the decree (if one there was) of the New York court against him, *in personam*, but the question was whether Phelan and Duffie or the land in Iowa were bound thereby; and as preliminary thereto, the most important question was one of *fact*, and that issue was whether the New York court had any jurisdiction[23] of Phelan, Duffie, Wright or the land and, consequently, whether said court had *actually made* a decree to bind anybody or anything in this suit. And on *that issue* the Iowa courts also found against Dulls.

Plaintiffs in error themselves presented to the Iowa court the issues (1) that the conveyance by them to Blackman of the Iowa land was procured by fraud, and that this entitled them to a recision of the sale, and (2) that such conveyance was without consideration.[14-15] Certainly neither of these issues presented a Federal question, vital as they and each of them were to Dull's right of recovery in *any* suit in any court. On each of these questions both the State courts (trial and appellate) found against Dulls; the latter court saying "That fraud on the part of Blackman had not been so established as to warrant a court in setting aside the conveyance made from Dull

to Blackman."[134] Aside from the plain fact that neither of such questions were Federal questions, both of the issues thus raised and so essential to Dull's recovery, were *questions of fact*, questions which, as we understand it, this court will not review on error to the highest court of a state. As these issues were such that Dulls must plead and sustain them by evidence in any court, whether state or Federal, in order to be relieved from the effect of their voluntary act in conveying their Iowa land to Blackman, surely such issues and the decision thereof against them, were grounds broad enough to sustain the judgment of the State court, without reference to any Federal question, or any number of such questions that might have been raised in the case. The decision of the State court, did not, therefore, rest on any Federal question, but on certain essential facts, and on the application thereto of certain elementary principles by and in whatever court the cause might have been brought. The judgment thus rendered against plaintiffs in error could have been given and must have been given (if the facts were as found by the state court whose finding thereon is conclusive) without deciding any Federal question, even if there was one in the case; and the decision of such a question, even if present, was not necessary to the determination of this cause.

Whether the courts of New York had any jurisdiction of Phelan and Duffie, respectively the title holder and mortgagee of the Iowa land, was another question of fact to be decided on the evidence by the State court to which the issue was presented. Dulls presented to the Iowa court that very issue. In pleading, in said court, the alleged decree of the New York court, they averred[14] that said court had "full jurisdiction of the parties and subject matter in controversy". This averment was controverted by Phelan, Duffie *et al*,[23] and

presented only an issue of fact to be determined on the evidence, and on its determination depended whether there was any decree to construe. A simple issue of whether or not there was jurisdiction in a cause and the decision thereof on extrinsic evidence presents not a Federal question *but one of fact*, upon which we think the finding of the State court is conclusive; and said *alleged New York decree* nowhere recites or claims that Phelan, Duffie or Wright were ever served in New York with notice of said suit or ever appeared thereto.

Dull's laches was another independent issue found against them by the State court;[134] was a matter of importance in an equity cause such as this, and barred a petitioner from relief however good a cause he may have originally had. The decision on that issue alone was sufficient to sustain the judgment rendered. It was a defense independent of any other defense, (even if the other defense rested on a Federal question) and was sufficient of itself, *Jenkins v. Loewenthal*, 110 U. S. 222.

The settlement made between Dull and Blackman, which settlement was found as a *fact* in the decree[106] from which the writ of error was prosecuted in this cause, was certainly a sufficient estoppel against Dulls when claiming the land as against Phelan and Duffie whose rights in and to the land had accrued in reliance on such settlement, and the information thereof given to them by Dull. The sufficiency of that plea and of the evidence to sustain it, was purely a question for the State court, and its decision, whether correct or erroneous is not, we believe, subject to review here, as this court does not sit as a court of appeals from the decision of a State court. So that if there had been several Federal questions in the case, and all of them had been held in Dull's favor, this question of estoppel by their settlement,[135] and the disclosure thereof to Duffie and through him to Phelan, and the latters' re-

liance thereon when taking the deed and mortgage, surely furnished in itself a ground of decision sufficiently broad to sustain the judgment rendered by the State court against the Dulls, and now complained of by them.

The decree and findings in the record were those of the trial court, but as they were "in all respects affirmed" by the Supreme Court of Iowa which does not in such cases prepare, sign or enter a new decree, they became at once the findings and decree of the Supreme Court. The court in its opinion states that: "We are fully satisfied in every particular with the decree of the District Court."[185] That decree and the opinion of the Supreme Court show that other material matters were considered and necessarily entered into the result; and among them were such questions as the effect of Dull's neglect to record his mortgage; and his failure to return that mortgage and the $10,000.00 note which he received from Blackman. These questions were *all* decided adversely to plaintiffs in error. We refer to the opinion as well as to the record, as we take it that since the adoption (April 28, 1873) of Sec. 2 of Rule 8 of this court, your honors exercise the right of looking into the opinion of the State court, as one of the best means of ascertaining what questions were involved, and what decisions were rendered thereon. *Wood Machine Co. vs. Skinner*, 139 U. S. 293; *Murdock vs. Memphis*, 20 Wall, 590; *Gross vs. Mortgage Co.*, 108 U. S. 477; *Adams Co. vs. Ry. Co.*, 112 U. S. top of page 129, and *Fire Ass'n. vs. New York*, 119 U. S. 110.

We, therefore, confidently leave it to that opinion as well as the main record to further show the many material matters which said court did decide in the cause at bar, and that aside from the alleged Federal question, such decision was based on independent grounds, each broad enough to sustain its judgment

without regard to the alleged Federal question, and that hence this court will not take jurisdiction of this cause. *Murdock vs. Memphis*, 20 Wall, 590; *Beaupre vs. Noyes*, 138 U. S. 397; *Mowing & R. Co. vs. Skinner*, 139 Id. 293; *Hammond vs. Johnson*, 142 Id. 73; *Navigation Co. vs. Reybold, Id.* 637; *Eustes vs. Bolles*, 150 Id. 361, and *Railroad Co. vs. Cent. Ry.*, 159 Id. on page 640.

We have always understood the rule to be that if a party intends (in case he is beaten) to take his case to this court, to review the judgment of the highest court of the State, he must rest his case solely on a Federal question; that he cannot have the advantage of presenting to the State court one or more *other* issues, not involving any Federal question, and trying to have a judgment in his favor *thereon*, and that when he is beaten on *all* the issues, ignore the judgment of the State court against him on the non-Federal questions, and have another day in *this* court on *one* of the several issues decided against him by the State court—*i. e.* a Federal question— if such question actually existed in the case.

II. On Motion to Affirm.

As we have seen, there was no jurisdiction in the New York court of any of the parties to the action therein, except Blackman, and as he had parted with all his interest in the subject matter of such suit as early as September 14th, 1892,[38] and before the commencement of the action in New York (which was on November 3d, 1892),[42] the making of him a party to such suit, as well as making him a defendant in the cross-petition filed in the Iowa court on February 15, 1893,[13] certainly seems strange and useless. That he had parted with all his interest in the subject matter of the suits in both the states, was found as a fact by the Iowa courts.[133] Then the claim of plaintiffs in error to bind third parties or to bind the subject matter of

the suit, by a decree of a foreign court against Blackman, when such court did not have jurisdiction of either the subject matter or of such third parties to be affected by such decree, is the "Federal question" in this cause.

The decision and judgment of the Iowa court did not involve the *construction* of the decree of the New York court, but did determine whether or not there was jurisdiction in the last named court to make a decree which would affect Phelan, the record title holder and Duffie, the mortgagee—for there was no pretense of local jurisdiction of the subject matter of the suit. The question of fact, to be tried upon evidence, outside of the copy of the alleged decree, was whether Duffie, Phelan, Wright *et al*, were residents of New York, or were found in that state and served with summons therein; and if not, whether they had voluntarily appeared to the suit. If they had been so served or had voluntarily appeared to the action, such court might, in case there was "fraud, trust or contract" as between Phelan or Duffie, and Dull, have had jurisdiction to render a decree *in personam*. *Massie vs. Watts*, 6 Cr. 148. But as the real estate which was the sole subject matter of the suit, was wholly without the territorial limits of New York, and as there was no jurisdiction of the persons of the said defendants, there was, of course, no decree to construe or to which to give the full faith and credit that an actual judgment of one State would be entitled to in another State.

The alleged New York decree does not of or in itself furnish any evidence or contain any recital of facts showing or claiming that any service of process was had on Phelan, Duffie or Wright in that State or that they or any of them made any appearance to such suit. If such decree had contained such recitals, or of itself in any manner claimed jurisdiction of said

parties, such claim and recitals would still have been open questions whenever such jurisdiction was denied. That the lack of jurisdiction is a defense to any claim founded upon a judgment of the courts of another State, is well settled in this court. *Christmas vs. Russell*, 5 Wall. 290; *Maxwell vs. Stewart*, 22 Id. 77; as well as that a judgment is absolutely void unless process was served or the party appeared; *D'Arcy vs. Ketchum*, 11 How. 105; and that if there had been a due return of the sheriff that personal service had been made, that might be contradicted; *Knowles vs. Gaslight Co.*, 19 Wall. 58; and *Thompson vs. Whitman*, 18 Id. 457. It is also noticeable that no attempt was made by plaintiffs in error to show that there was any service in New York of process on or appearance by Phelan or Duffie or Wright. The evidence of said defendants to the contrary was conclusive and undenied.[42]

Indeed the New York court in making an order for publication of notice of its pretended suit against them[61] expressly found and made of record, that personal service of the summons from said court could not be made on Wright, Askwith, Phelan and Duffie, or any of them, within the State of New York. And by the stipulation of the parties, made on the trial, it was settled that neither of said persons were served elsewhere than in Nebraska and Iowa, and that neither of them ever appeared to the New York suit.[42] The only service of notice of the New York suit was a pretended service in Iowa and Nebraska. It is nowhere pleaded by Dulls that the decree of the New York court taken as this was on a pretended service on parties in another state and without an appearance by them, would have in *that* State the force and effect which it is now claimed should be given to it in the courts of Iowa. There is no showing of that kind.

Nevertheless, plaintiffs in error claim that the al-

leged decree against Blackman, pretended to be given in a suit brought after he had divested himself of all his interest in the subject matter thereof, and in which nobody was served within the New York jurisdiction, or appeared (except himself), divested the interests of others (who were not before the court), in the subject matter of the suit, which was real estate lying in another state.

This is the "Federal question" claimed to be in this cause, and in the decision of which this court is asked to reverse the judgment of the State court, given on other and different issues of which this court has no cognizance and upon which "Federal question" the State court passed no further than to find that it did not exist, and that, there was no evidence of any New York decree as to Phelan, Duffie and Wright for the State court to construe in an action against them, in which action Dulls alleged that Phelan and Duffie held the beneficial interest in the subject matter of the controversy. The decision of the State court was that as a *matter of fact* there was no decree of the courts of New York as to Phelan, Duffie and Wright, and this cause therefore, comes plainly within the decision of this court in *Mining Co. vs. Boggs*, 3 Wall. 304. The question there *claimed* to be before this court was that the State court had decided against the *validity* of a license to extract gold from certain lands, and this court said (page 310): "The decision was that no such license existed; and this was a finding by the court of a question of fact upon the submission of the whole case by the parties, rather than a judgment on a question of law." And this court added that the case was the same in principle as a defense, in ejectment, of a patent from the United States, with an allegation of the loss of such patent and said: "Such judgment would deny, not the validity, but the existence of the

patent, and this court would have no jurisdiction to review it."

For plaintiffs in error to say that this court has jurisdiction in this case, is to claim that this court should determine that the highest court of a State has failed to properly construe and failed to give force and effect to a foreign decree, which, that State court has decided, on extrinsic evidence and on an issue squarely raised, did not exist. What that Iowa court necessarily did at the very outset of the case, and before it could construe or give or refuse to give force and effect to the alleged decree, was to pass on the testimony on the said issue and ascertain if there was any decree which in turn would be competent evidence against those parties who denied any jurisdiction of them in the court whose decree it was alleged to be. For that a valid judgment—one rendered on full jurisdiction both of the parties and subject matter of the suit by the courts of one State, is but *evidence* in the courts of another State; and that Art. 4, Sec. 1, of the Constitution and Sec. 905 of the Rev. Stat. simply establish a rule of evidence, is settled. Story on Comflict of Laws, 7, Ed. 609; *Thompson vs. Whitman*, 18 Wall. 457; *Hanley vs. Donoghue*, 116 U. S. 4, and *Wisconsin Insurance Co.*, 127 U. S. 292.

Despite all this the plaintiffs in error claim or seem to claim that if they have a decree *in personam against Blackman* in the New York court, then such decree is conclusive both upon the land in the foreign state, and on the title holder and incumbrancer who were not before the court rendering such decree and that what *purports* to be a decree is conclusive that it is such, and that it is also *conclusive of the jurisdiction of the court rendering* it *over the persons* whose names are mentioned therein. Their mistake is evident.

2. There was then no decree, even *in personam*,

to enforce against the owner and mortgagee of the land; nothing to construe or to give effect to as between individuals. Was there then any judgment *in rem* to bind the subject matter of the suit or to act upon it and settle its status, independent of any act of the owner Phelan or the incumbrancer Duffie to be performed with reference to it?

That the jurisdiction over real estate is territorial and local, and can only be exercised where the land is situated, is, we believe, elementary. Speaking on this subject Judge Story said: "And certainly there can be *no pretense* that such judgment or decrees bind the property itself, *etc. Conflict of Laws*, 7 Ed. §. 543, page 685. "A decree cannot operate beyond the state in which the jurisdiction is exercised. It is not in the power of one state to prescribe the mode by which real estate shall be conveyed in another." Judge McLain in *Watts vs. Waddle*, 6 Pet. 389. And see *Ellenwood vs. Chair Co.*, 158 U. S. 105. And speaking of such a decree as Dull sought in his New York suit this court has said: "It is clearly not a judgment *in rem*, establishing a title in land but operates *in personam* only." *Hart vs. Samson*, 110 U. S. 155. And in that case this court, speaking of the equity powers of a court in such cases as that brought by Dull in New York, says: "It has no inherent power by the mere force of its decree to *annul a deed or establish a title*. If the New York decree did attempt to annul a deed, *i. e.* the deed, from Dull to Blackman, it did something which this court says it could not do. Beyond that it only professed to act *in personam* requiring *Blackman* to deed it back and did not attempt to "establish a title" as against his grantees and incumbrancers. In *Carpenter vs. Strange*, 141 U. S. 87, where both plaintiff and defendant, the title holder of land in Tennessee, were residents of New York, and

defendant was served in said state of New York and appeared to the suit therein, this court held (p. 106) that the decree of the New York court was a nullity as to such real estate in the other State.

In Iowa, where the land in controversy is situated, the jurisdiction in such cases as this is strictly limited to its locality. The law of that state reads: Code of 1873. "Section 2576. Actions for the following causes must be brought *in the county* in which the subject of the action, or some part thereof, is situated: 1. For the recovery of real property, or of an estate therein, or for the determination of such right or interest."

And in speaking of such foreign judgments, the Supreme Court of Iowa said conclusively: "When the case involves naked questions of title, the courts of a State, other than that where the land is situated, cannot sustain their jurisdiction." And that such courts "having authority to act upon the person may make decrees not binding on the land itself, but on the conscience of the party in regard to the land." *McGregor vs. McGregor*, 9 Ia., 65. And to the same effect, *Burnly vs. Stevenson*, 24 Ohio, 474.

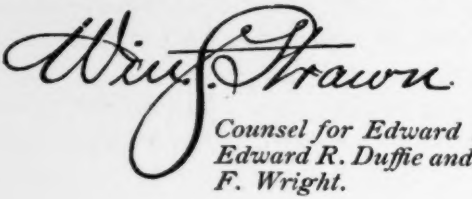
The question, if any, of the effect of service on Phelan and Duffie in the State of Nebraska, and on Wright and Askwith in the State of Iowa, of what purported to be a summons to appear before the New York court in the suit in which the alleged decree was entered, is disposed of in a few words. Where the subject matter of the action, such as realty, lies within the territorial jurisdiction of the court in which the suit is brought, it is competent for the legislature of such state to provide for *constructive* service, as by publication, or by personal service without the state, on parties to such a suit who cannot be served within said state, and on such service to exclude parties so served from any interest in or claim to the *rem* then

being within the actual jurisdiction and control of the said court. But to say that such court can by constructive service, or by the aforesaid substitute therefor, divest the interests and adjudicate the rights of parties who are non-residents, in real estate lying beyond its territorial limits, is, we believe, a proposition which requires no other refutation than a simple statement thereof. This claim of a Federal question by reason of the failure to give effect to a decree of the courts of another State, where that court had no jurisdiction, either of the parties owning the interests sought to be divested, or of the subject of the action, seems to us to make "the question on which the jurisdiction depends so frivolous" as to justify us in moving for the affirmance of the decree.

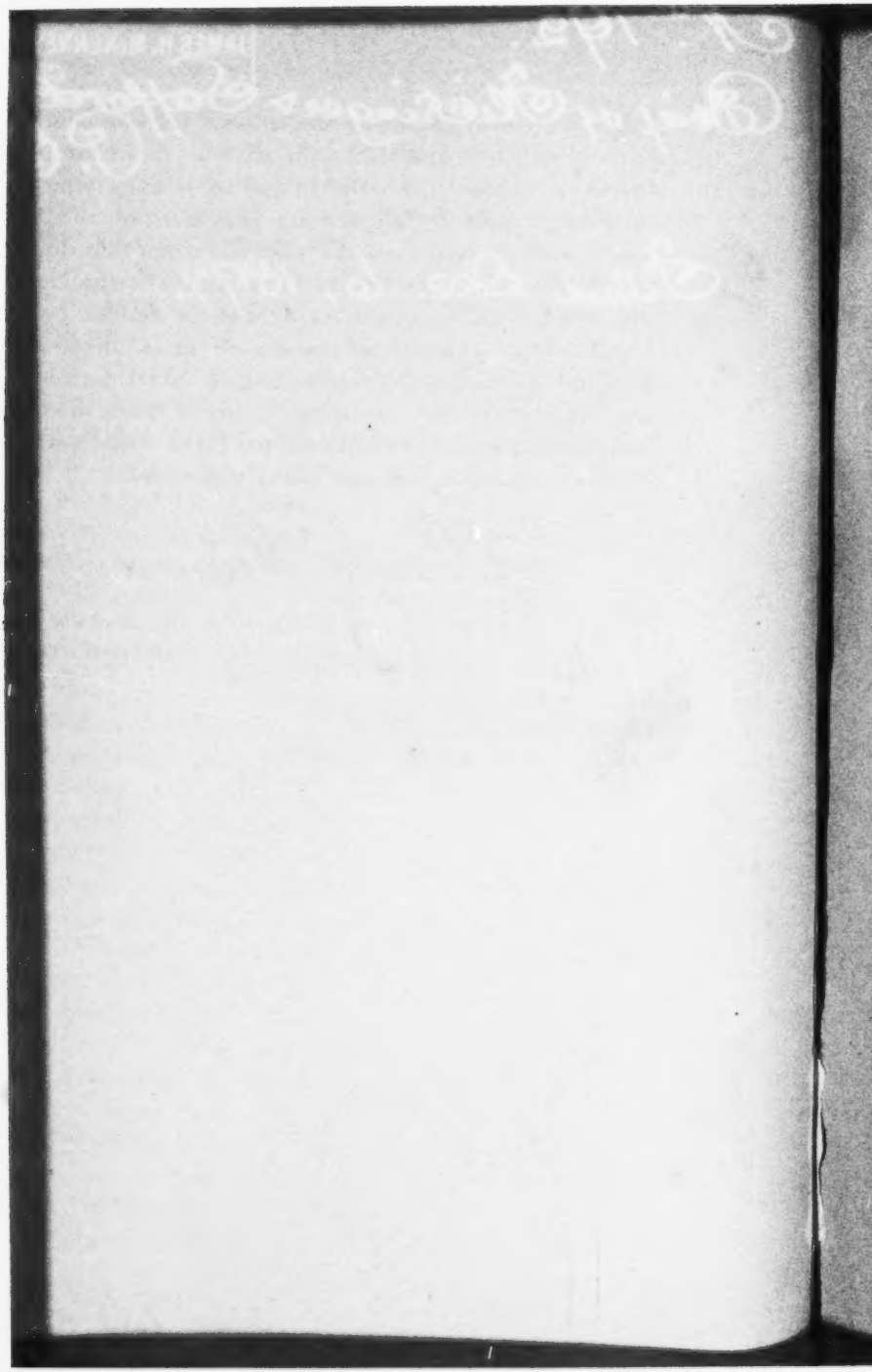
3. The alleged New York decree, offered in evidence in the Iowa court, did not profess to do much anyway. It said that it annulled the deed from Dull to Blackman; but this court said it had no power to do so. *Hart vs. Sansom, Supra.* If it had annulled said deed, it certainly could not affect rights which had attached to the land while the title was of record in Blackman; and if Blackman had reconveyed, as said decree required him to do, he certainly could not have conveyed any greater rights than those remaining in him when such reconveyance should be made. And the requirement of the alleged decree that *Blackman* should reconvey to Dull, looks a little as if said court had not much faith in the power of *its decree* to accomplish that end by the force of such decree. If the New York court wants to attempt to punish Phelan and Duffie for disobeying its alleged but void injunction, it has that privilege whenever they come within its jurisdiction. But it does seem a little unreasonable for Dulls to practically ask the Iowa court to (in effect) punish Duffie and Phelan for disobedience to said al-

leged decree, by divesting the title of the one and the lien of the other, and then complain to this court that the Iowa judiciary, in failing to do so, is not giving full faith and credit to the alleged judgment of the New York courts. Especially is this true when that decree is a nullity both as to the land in controversy and as to the owner Phelan and the incumbrancer Duffie.

These considerations should, we think, dispose of so much of the case as comes to this court, and leave the judgment of the Supreme Court of Iowa to stand on the other issues and questions there tried and decided in our favor. Respectfully submitted,



Counsel for Edward Phelan, Edward R. Duffie and George F. Wright.



No. 192.

Brief of Flickinger v Safford &c.

Supreme Court of the United States.

No. 102.

Filed Dec. 6, 1897.

DANIEL DULL AND NELLIE M. DULL,
Plaintiffs in Error,

against

JOHN E. BLACKMAN, EDWARD PHELAN, EDWARD R. DUFFIE AND GEORGE F. WRIGHT,
Defendants in Error.

Brief and Argument for Plaintiffs in Error on the Motion to Dismiss or Affirm.

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1897.

Supreme Court of the United States.

DANIEL DULL and NELLIE M. DULL,
Plaintiffs in Error,

AGAINST

JOHN E. BLACKMAN, EDWARD PHELAN, EDWARD R. DUFFIE and GEORGE F. WRIGHT,
Defendants in Error.

No. 192.

Brief and Argument for Plaintiffs in Error on the Motion to Dismiss or Affirm.

The statement in the first paragraph of the motion, to the effect that Phelan, Duffie and Wright are the only defendants served with the citation to appear in this Court, repeated also in the brief accompanying the motion, is not understood, in view of the writ of error (p. 137) and the citation (p. 138) addressed to *John E. Blackman*, Ed. Phelan, E. R. Duffie, George F. Wright, or to W. S. Strawn, E. R. Duffie and Wright & Baldwin, their attorneys, and in which they are described as *defendants in error*, they are brought fully within the jurisdiction of the Court by an acceptance of service on the 29th day of May, 1896, by Winfield S. Strawn and Wright & Baldwin, attorneys for the defendants in error (p. 139).

The matters in controversy in this proceeding arise from the following facts:

It appears that in the year 1703 the Bloomingdale road in the City of New York was laid out upon land belonging to one John Hopper, who died in 1706, and in the year 1847 that road was partly discontinued and a new road (now Broadway) was laid out, following substantially the line of the old Bloomingdale road, but at some points varying therefrom, one of such places being at its intersection with Fifty-first street, where there was a strip of such ground lying between the easterly limits of the abandoned Bloomingdale road and Broadway, as now located.

Upon this abandoned part of the road the plaintiff in error, as a tenant under Lyon, had erected a building at a cost of more than forty-five thousand dollars ($45,000), and he claimed to have a verbal arrangement with his landlord, under which the latter was to purchase the building at the termination of the lease, and in 1889 that time was near at hand.

The strip of ground upon which the plaintiff in error had constructed his building had reverted by operation of law to the heirs of John Hopper, some two hundred in number. About that time the defendants in error, Blackman, Wright and Duffie, organized a sort of a syndicate to obtain the title of the Hopper heirs, and put themselves into communication with the plaintiff in error and opened negotiations with a view to sell to him the title of the Hopper heirs in the little strip of ground; these negotiations finally resulted in an agreement between the parties, and in consideration of the deeding by the plaintiff in error to the defendant Blackman of five hundred and fifty (550) acres of land in Pottawattamie County, Iowa, Blackman agreed to vest the plaintiff in error with eighty-five per cent. (85%) of the title, and at that time delivered a deed to be held in escrow, and also a mortgage to the plaintiff in error expressed to be for the con-

sideration of ten thousand dollars ($10,000), which it was understood was to be left unrecorded for an indefinite time. The deed of Dull and wife conveying the Iowa land is dated June 28, 1889.

Blackman's first move in the direction of defrauding the plaintiff in error was to sell and convey surreptitiously and without the knowledge of the plaintiff in error to one Lyon, the plaintiff's landlord, the same interest in the strip of ground which he had formerly sold to the plaintiff in error, so that the consideration for the conveyance of the Iowa land, which is the land now in controversy in this suit, wholly failed.

Blackman's next fraudulent step was to deed, on the 2d day of August, 1889, the entire tract of Iowa land to one George F. Wright, the consideration of which was pretended to be a promise on the part of Wright to advance money in the future to aid Blackman in forwarding his New York projects; but Wright never advanced any money, and by the decree of the Supreme Court of the State of Iowa in this proceeding it was found that no money or other valuable consideration had been paid by Wright, and his deed by order of that Court was canceled.

During Wright's ownership he had mortgaged the same property to one Askwith, this mortgage, however, cuts no figure, in this case, as it was not seriously relied upon at the hearing, and was also ordered by the Court to be canceled. We refer to it, however, only for the purpose of accounting for the appearance of Askwith as a defendant in this case.

February 2, 1892, Blackman commenced his suit against Wright and Askwith, claiming the facts as above found by the Supreme Court of Iowa, that the conveyance by Blackman to Wright was made upon a consideration which had wholly failed.

Dull had brought home to Blackman the fact that he had found out that Blackman had deeded the property he had sold him to Lyon; Blackman ad-

mitted his fault and declared his intention to right the wrong he had occasioned to the extent of reconveying the Iowa lands, but he was confronted with the deed to Wright, which purported upon its face to convey an absolute title, and Dull knew that Blackman had instituted the suit for the cancellation of the deed to Wright, and made no objection to its prosecution because it would enable Blackman the better to make restitution of the lands.

The suit in the District Court of Iowa proceeded without incident until the 17th day of September, 1892, when the defendant Ed. Phelan filed his petition for intervention in the cause, setting forth that on the 30th day of January, 1892, Blackman was the equitable owner of the lands described in his petition and had conveyed to him an absolute title thereof. Phelan appears to have been a mere speculator in the title, risking but seventy-five dollars ($75), and he was to make advances to Blackman not exceeding, however, one thousand dollars ($1,000) in all; what part of that amount of money, if any, he has advanced other than the seventy-five dollars ($75) does not appear. Although Phelan obtained the title January 30, 1892, three (3) days before the suit was brought in Iowa, it was understood evidently that the deed was not considered as having any vitality until the 15th day of September, 1892, when Blackman and Phelan entered into an arrangement as to what should be done with the estate after Blackman quieted the title in himself.

Having agreed among themselves how they would divide the plunder, Phelan filed his petition of intervention two (2) days following the execution of the agreement, and in his petition brings to the attention of the Court the fact that Dull and other persons claim to be interested in the subject matter of the suit and prayed to have them made parties defendant. This is the first mention of Dull's name in connection with the Iowa suit; it does not appear that Dull knew of this intervention of Phelan and the attempt to make him a party to the suit prior to

the 2d day of November, 1892, when he instituted his suit in New York; but when he ascertained that Blackman was not prosecuting the suit for the purpose of enabling him to make restitution of the land as he had claimed, and had involved the estate in a further complication by the conveyance to Phelan, seventeen (17) days after Phelan intervened, Dull instituted his suit November 2, 1892, in the Supreme Court of Westchester County, New York, against Blackman and his wife, Wright, Askwith, Phelan and Duffie, claiming that the consideration for the deed of the Iowa lands was procured by fraudulent representations and concealment and that the consideration had wholly failed, and asking for an injunction against the defendants, restraining them from attempting to convey the lands in question and the defendant Blackman from further prosecuting the suit in Iowa or permitting it to be prosecuted, and on the 9th day of November, 1892, the Supreme Court of New York issued a writ of injunction *pendente lite* to be found on page 46 of the Record.

Service of the summons in this case was made upon Blackman personally within the State of New York; Blackman appeared therein by J. Albert Lane, his attorney, filed his answer (p. 56), cross examined the plaintiff (p. 51) and testified (p. 54), and in his testimony says as follows: I am "the principal defendant in the suit in Westchester County, New York, entitled Dull *vs.* Blackman and others, and I appeared in that case by counsel and contested the action on its merits."

Further service of the summons in the New York suit was made by delivering to the other defendants therein at Omaha, Nebraska, and Council Bluff, Iowa, on the 24th day of December, 1892. a certified copy of the proceedings theretofore had therein and the preliminary injunction regularly issued and in the manner above stated served upon all the defendants, continued in force without having been in the least modified, vacated or set

aside until the Special Term of that Court held in April and May, 1893, when a final decree was rendered sustaining the claim of the plaintiff in error in every particular (p. 62), setting aside the conveyance by Dull to Blackman of the land in controversy here, on the ground of fraudulent representations, concealment and failure of consideration, and ordering all the defendants to make restitution, and issued a perpetual injunction against them which has remained in full force from that time until this.

All the defendants were again fully informed of the fact of the pendency of the injunction against them by the pleadings of Dull and wife, filed in the Iowa Court, February 3, 1893.

Hence it appears that on the 9th day of November, 1892, more than two months before Duffie withdrew his appearance for Blackman and was permitted by the Iowa Court to prosecute the action thereafter in Blackman's name for and in behalf of Ed. Phelan as intervenor, Blackman had been continuously enjoined from prosecuting that suit or permitting it to be prosecuted, and the other defendants were also named in the same injunction, and although they had full knowledge of it, now claim not to be bound by it, upon the ground that the personal service on them outside of the State of New York does not give them sufficient and such notice as they are bound to respect. The injunction being certainly in force against Blackman, he could not therefore prosecute the suit, and it is difficult to see how anyone could intervene and prosecute the suit in his name, particularly Phelan could not do so, as he was a party having knowledge of the injunction, and as intervenor could not have as the successor of Blackman any other or greater rights or privileges in regard to it than Blackman then had.

A very large portion of the record is taken up with amendments to the bill, the answers of the several defendants and amendments thereto which this motion need not be specially referred to; Dull and his wife became parties February 2, 1893, to the

suit in Iowa and upon their first appearance filed a plea in abatement to the proceedings based upon the facts of the pendency of the suit in the Supreme Court of New York and filed with their plea a transcript of the proceedings up to that time and upon the rendition of final judgment in New York filed another answer *puis darrein* continuance accompanied by a transcript of the proceedings and decree in that Court to be found on pages 42, &c., of the Record.

Although at the very outset of Dull's appearance in the Iowa suit, there was brought into this record the fact of the New York suit and its determination in favor of the plaintiff in error, the Iowa Courts and all the defendants in error have ignored the New York proceedings in which they were all under injunction not to prosecute the suit or permit it to be prosecuted and in order to evade the injunction and have attempted to give Phelan, the speculative intervenor, the right to take control of the litigation in Blackman's name and have re examined the whole case as between Blackman and Dull, in regard to the fraud that was perpetrated by him upon Dull in the State of New York, and the other matters involved in the suit there, and have attempted to reopen all the questions settled finally between them by the decree of the New York Court, and have determined that that judgment is without force and affect and that Blackman was not guilty of swindling the plaintiff out of his land, contrary to what that Court had decided, this attempt on the part of the District and Supreme Courts of Iowa to nullify the judgment of the Supreme Court of New York, the Federal question involved in this case, under Section 1 of Article IV. of the Constitution of the United States, which requires that "full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State."

Argument on motion to dismiss.

The motion to dismiss is founded upon five different grounds, all, however, depending upon one legal proposition, and that is that where a Federal question is associated with other independent questions, not of a Federal character and each is broad enough to sustain the judgment without any regard to the Federal question, the plaintiff in error shall take nothing by his writ; this is undoubtedly a correct statement of the rule, but the case at bar does not present that situation. The alleged independent questions were all personal to Blackman and Dull. The fraud of Blackman in obtaining from Dull the conveyance of the Iowa lands, the entire failure of the consideration for making the conveyance, whether Dull failed to restore, or offered to restore, what he had received from Blackman or had settled with Blackman, or was guilty of laches in not seasonably prosecuting his claim are all shown to have occurred before Blackman instituted his action in the Iowa Courts, and these questions were all finally and definitely settled by the judgment of the Supreme Court of the State of New York; that Court found the fact of fraud, entire failure of consideration and they did not find nor did Blackman in his defense in the New York suit claim that Dull was guilty of laches because he had not restored to him the utterly worthless mortgage and deed which Blackman had placed unrecorded in escrow, there was no laches for he had made an absolute conveyance to Dull's landlord of the property which he had previously mortgaged to Dull; evidently there was nothing to restore and it does not appear that this worthless mortgage and deed had ever left the possession of the third person in whose hands it was held as an escrow; while in the hands of the third person it was as much in the possession of Blackman as it was in the possession of Dull; it is absurd therefore to say that Dull neglected to restore what he had re-

ceived, for in point of fact he had received nothing, nor is it true that Dull had settled with Blackman. Blackman and Dull both testified that there was no settlement, and the testimony of Duffie is contradictory to itself upon that point.

The Supreme Court of Iowa did not so find; that Court says (p. 130), that there is a dispute as to whether a settlement was in fact reached between Dull and Blackman. At the meeting in Chicago there was an arrangement looking to a settlement, but not a settlement of itself; Blackman had an understanding with Dull; that he in his endeavor to right the wrong he had perpetrated, he would institute proceedings to get rid of the fictitious deed to Wright, and would upon quieting his title reconvey the lands to Dull, but such an arrangement was far from being a settlement, and if it was intended for a settlement Blackman afterwards executed a deed carrying full title to Phelan. Blackman thereby destroyed all the consideration if any there was for such arrangement, so also in regard to the pretended laches of Dull in not asserting his claim of fraud with celerity, until Dull became aware of the surreptitious deed to Phelan he was led to believe that Blackman was endeavoring to place himself in such a position that he could reconvey the estate to Dull as he confesses he ought to do; all of these questions were subject matters of litigation in the New York suit, were all purely personal between Blackman and Dull, and without reference to the other defendants and were all finally and fully settled and determined by the judgment of the New York Supreme Court in May, 1893, upon the suit brought by Dull in the November preceding.

Each and every one of there causes which are put forth as reasons for the dismissal of the suit, were therefore not independent of the Federal question, but were closely interwoven with it, and as an entirety make the Federal question, which authorizes this writ of error.

After the decision of the New York Court had been brought into this case as a matter of abatement, the Iowa Court did not give to the judgment of that Court full faith and credit to which it was and is entitled, but ignored it and undertook to re-examine and to determine one of the questions litigated in the New York suit. Had full faith and credit been given to that judgment, the fact of fraud of failure of consideration, &c., by the Iowa Courts, those Courts could not by any possibility have rendered a judgment adverse to the plaintiff in error.

On the 9th day of November, upon the application of Dull to the Supreme Court of New York, in the suit against Blackman and the other defendants in this proceeding, and in which Blackman was personally served with notice in the State of New York, he entered an appearance, cross-examined witnesses and testified, while the other defendants were personally served with process outside the State of New York, and they were all severally enjoined from the prosecution of the Iowa suit; Blackman seems to have superficially obeyed the injunction at least so far as actively proceeding in the conduct of the litigation; the effect of that injunction was to deprive the Iowa suit of its only plaintiff, but the other defendants who appear from the testimony to be in a conspiracy to get possession of this Iowa land, and which they have agreed to distribute among themselves to the exclusion of the plaintiff in error, have attempted to evade the force and effect of the injunction by putting into the place of the then plaintiff, who had been driven into quiescence by the New York injunction, one of the co-conspirators who had entered into this arrangement to deprive Dull of the property to which he was entitled by virtue of the decree of the Supreme Court of New York, and accordingly obtained from the Iowa Court an order permitting Phelan to prosecute the suit thereafter in the name of Blackman, and the Court attempted to give to Phelan, as the successor to Blackman, rights and privileges in the Iowa suit

which Blackman himself did not have; in other words, it is claimed that new rights and new privileges sprang into existence as between the plaintiff's side and the defendant's side of the Iowa suit when Phelan became what is improperly termed in the brief on the other side "the substituted plaintiff." If he was permitted to stay in the shoes of Blackman, and prosecute the suit in the name of Blackman, he could only do so to the same extent that Blackman could have done; if Blackman was under disability Phelan succeeded to that disability.

It is true that the courts of the State of New York cannot act *in rem* to control the manner and method of the conveyance of lands in another State, but the proposition is well settled that the courts of one State can by proceeding *in personam* control a party to a suit in another jurisdiction, and that its decree will be effective is well recognized in all of the authorities to be found in the brief *contra*. A quotation from the syllabus of Burnley *vs.* Stevenson, 24 Ohio St., 474, seems to correctly state the proposition:

> "The court of equity in one State having acquired jurisdiction over the persons of all the parties, may enforce a trust, or the specific performance of a contract in relation to land situate in another State."

If it be true, as argued upon the other side, that Blackman "dropped out of the case," and for that reason there is nothing left in the case for the New York judgment to operate upon, if it has that far-reaching effect, then the entire case is out of existence. The disappearance of Blackman is found in the record on page 100, which is to the effect that on the 24th day of January, 1893, the omnipresent Duffie withdrew his appearance for the plaintiff, evidently in order that he might appear for Phelan, who was thereafter to be invested and known inthe case as Blackman. What was the effect of Duffie withdrawing his appearance? Blackman was still

left as plaintiff, in name at least; if he fully disappeared from the litigation there would have been a judgment of nonsuit, but he seems to have only gone out of the case in a pretended compliance with the injunction of the New York Court, and to transfer to Phelan the right to prosecute the suit for his and Phelan's interest, because it appears that these worthies had previously entered into a contract by which a division of the spoils was provided for in any possible outcome of the litigation under that contract; Phelan, after the title to the land should be fully established in him (p. 39), and the property appraised was to pay to said Blackman a sum which with that already paid to him should equal one-half the net sum of the appraisal of said land after deducting the amount paid Wright and others, so that Phelan as "substituted plaintiff" not only represented himself, but prosecuted the litigation for *the joint benefit of himself and Blackman*, this was both a direct and an indirect violation of the New York injunction. Had there been no injunction and had the case proceeded with Blackman upon the one side and Phelan upon the other and the other defendants, it would have made no difference whether Phelan prevailed or Blackman prevailed, for by their agreement they provided for the same and a satisfactory division of the plunder in either event, the only question ever at issue between Blackman and Phelan being how after having deprived Dull of his costly building in New York which they enabled his landlord to take from him, they should arrange for a division among themselves of the land which Dull had conveyed to Blackman without consideration.

If these parties are able to have the title "quieted in Phelan," as the decision of the Supreme Court of Iowa naively says, it will result in Dull's losing, through the confessed fraud of Blackman and the conveyance to Phelan upon an expenditure of only seventy-five dollars ($75), the land he conveyed him and without having received the least consideration.

In 1889 Dull owned a valuable building in New York and 550 acres of land in Iowa; and he entered into negotiations with Blackman in an attempt to save the New York building from the rapacity of his landlord, Blackman, Phelan and it now appears Duffie have for the past five years been under contract with each other as to how they should divide the land in Iowa which Blackman had swindled Dull out of, a division which could not be made if proper consideration had been given by the Iowa Court to the final judgment of the New York Court.

It is perfectly evident that Blackman, at the very outset of his negotiations with Dull, expected to defraud him out of the land, because he was willing to give up so large a part of what he had received for so small a consideration to those who joined with him in the adventure. Blackman had an interest which was of sufficient value to some one, so that Lyon (Dull's landlord) gave him ten thousand dollars ($10,000) for it. This interest was of sufficient value so that an honest and well-intentioned owner would not have been willing to give away a large portion of the consideration received therefor to outside volunteers, who paid little or no consideration therefor unless he had some sinister motive in so doing.

Blackman took in Duffie and Phelan as partners to divide up this consideration, which was presumably worth at least ten thousand dollars ($10,000), and the proof clearly shows was worth nearly thirty thousand dollars ($30,000), one on the payment of seventy-five dollars ($75), the other in payment of a certain bill for professional services of a very hazy nature and certainly of very small actual honest value, services which were probably rendered, if at all, to enable Blackman the better to carry out his fraudulent schemes against the plaintiff in error.

ARGUMENT.

I.

As to the jurisdiction of the Supreme Court of Westchester County, New York, to hear and determine the controversy.

Blackman was personally served in New York, appeared and defended the action, and there can be no question but that the Court had jurisdiction of the person to hear and determine the controversy before it, as to him.

The only remaining question is the right of the Court to assume jurisdiction of the subject-matter of the action by reason of the lands in controversy being without the boundaries of the State of New York, and situated in the State of Iowa.

The action sought *a cancellation of the conveyance of the Iowa lands made by Dull to Blackman on the ground of misrepresentation and fraud.* The answer resisted the cancellation by general denial and set up various defenses.

See Abstract, 76-81; Transcript, 43 to 46 and 99-106; Transcript, 56 to 60.

In *Massie* vs. *Watts*, 6th Cranch, 148, an action was brought in the United States Circuit Court of Kentucky for the purpose of enforcing a conveyance of lands in the State of Ohio. Among other defenses, it was claimed that the Kentucky Court had no jurisdiction by reason of the lands being located in Ohio. The action was based on the wrongful location by the defendant of certain land warrants on lands within the State of Ohio. It was claimed that the location should have been made in plaintiff's name instead of the defendant's, and a reconveyance of the lands to the plaintiff was prayed.

Chief Justice Marshall, in giving the opinion of the Court upholding the jurisdiction, among other things said:

> "The defendant, if liable, is liable either under his contract, or as a trustee. * * * It appears to the Court to be a species of *malafides* which will in equity convert the party into a trustee for the party originally entitled to the land. Either in consequence of contract or as trustee, or as holder of the legal title acquired by any species of *malafides* practiced on the plaintiff, the principles of equity give the Court jurisdiction, wherever the person may be; and the circumstance that a question of title may be involved in the inquiry, or may even constitute the essential point on which the case depends, does not seem sufficient to arrest that jurisdiction. *The Court is of the opinion* that in case of fraud of trust or of contract, the jurisdiction of a court of chancery is sustainable wherever the person may be found, *although lands not within the jurisdiction of the Court may be affected by the decree.*"

This case was followed in

Burnley vs. *Stevenson*, 24th Ohio St., 474; also in

Gilliland v. *McQuarry* 89*th Ky.*, 434; and

Gilliland *vs.* Inabnit *et al* ., 60th N. W. Rep., 211.

The law of the jurisdiction of courts of equity where the lands affected are without the jurisdiction of the State is summed up in the elaborate notes of Hare and Wallace in the case of *Penn* vs. *Lord Baltimore* in "Third Leading Cases in Equity," beginning on page 491:

> "Rights growing out of a trust or contract, or founded upon the principles of equity as between man and man, are purely personal, and are consequently to be upheld and enforced both by law and equity wherever juris-

diction has been acquired over the parties, without regard to the nature or situation of the property in which the controversy has its origin, and *even when the relief sought consists of a decree for the conveyance of lands which lie beyond the reach of the authority of the Court, and can only be reached through exercise of its powers over the person*" (p. 498).

See also

Dunlap vs. *Byers*, 67th N. W. Rep., 1067.

Wood vs. *Warner*, 6th Am. Law Reports, 570.

Mitchell vs. *Bunch*, 2d Page, 606.

Phelps vs. *McDonald*, 99 U. S., 298.

Lewis *vs.* Porlings, 16 Howard, 1.

McGregor *vs.* McGregor, 9 Iowa, 65.

Freeman on Judgments, 4th Ed., Sec. 572.

We submit that under the foregoing authorities, the fact that the land was without the boundaries of the State of New York did not divest the Supreme Court of Westchester County of jurisdiction to hear and determine the case, and, having jurisdiction of the person and of the subject-matter, all the matters and facts at issue therein are *res adjudicata*, and the decree is entitled to the same faith and credit in the State of Iowa as in the State of New York, where rendered.

II.

As to the effect of the judgment of the Supreme Court of New York when plead as a defense to the suit of Blackman vs. *Dull, in the State of Iowa.*

This decree, together with the evidence, pleadings, special findings of fact and conclusions of law, are

all set out in full on pages (Transcript, 42 to 67) 83 to 118, inclusive, of the abstract.

It will be noted that in addition to cancelling the conveyance of Dull to Blackman, *the New York Court ordered and directed Blackman to reconvey the Iowa land to Dull by good and sufficient deed, reciting the special findings of fact and conclusions of law, and the decree* (Abst., 116).

It was contended on the trial, and this was in effect the holding of the Iowa Court, that the New York decree had no extra territorial effect. That when *Blackman* transferred the litigation from the State of New York to the State of Iowa, and as plaintiff in the Iowa suit, together with his *alter ego*, Phelan, intervenor, against Dull, sought to render nugatory and void the effect of the New York decree against him, and to hold the land and the valuable rentals in absolute defiance of the findings and orders of the New York decree, that the courts of Iowa were powerless to afford Dull any relief.

This surely cannot be the law. It is a conception of the powers of a court of equity entirely at variance with its prestige and traditions, and which would limit its remedial and beneficent powers to the harsh and unyielding rules of the common law for relief, against which it owes its very origin and existence. Our contention is that when plead as a defense to the action brought in a court of equity in the State of Iowa by Blackman *vs.* Dull the decree of the Supreme Court of New York operated as a conveyance of whatever legal or equitable interests Blackman had in the land, the same as though the conveyance ordered had in fact been duly executed by him.

The parties were in a court of conscience, whose maxim, "Equity regards that as done which ought to be done," is the very foundation of its jurisdiction.

Equity regarding the substance, and not mere

form, considers things *directed or agreed to be done as having been actually performed.*

Opinion by Justice Washington in Craig *v.* Leslie, Third Wheaton, 563.
Pomeroy's Equity, Sec. 365, note I.
Also Pomeroy's Equity, Secs. 363 to 377.

By virtue of the New York decree it became as much the solemn duty of Blackman in a court of equity in Iowa to transfer his interest in the Iowa land to Dull as though a solemn agreement to do so had been executed under his hand and seal.

An oral agreement to release a mortgage is in equity the same as an absolute release.

> "A release of record would have been of no importance; that at best would have been mere evidence of a discharge which in equity had already taken place. Equity considers that as done which ought to be done."
>
> Huff *vs.* Farrell, 67th Is., 298.

Where a decree of a court of equity decreeing specific performance of a contract as to land in one State is filed in another, the party is entitled, on the filing of the decree, to specific performance.

Brown *vs.* Desmond, 100 Mass., 267.
Pingree *vs.* Coffin, 12th Gray, 304.

To the same effect was the holding of the Supreme Court of Ohio in

Burnley vs. *Stevenson*, 24th Ohio St., 474.

In this case one Scott employed a surveyor, Evans, to locate lands in Ohio, and agreed to convey to him a portion of the lands so located for his services. Evans having performed the contract, United States patents were duly issued to Scott, who failed to reconvey to Evans, as agreed, for his services. Scott died without conveying the lands to

Evans as agreed, and Evans filed his bill in chancery in the State of Kentucky against the heirs and representatives of Scott, claiming a specific performance of the contract as against them.

They were personally served, and on the hearing the Kentucky Court granted the relief prayed and ordered them to convey; which was never done. The plaintiff, claiming title under the heirs of Scott, brought an action in the Court of Common Pleas of Ohio for the possession and ownership of the land, and the defendants, as grantees of Evans, set up the decree in equity in the Circuit Court of Kentucky, ordering the heirs of Scott to convey, being simply a decree *in personam*. There was judgment for the defendants, and, on appeal, the Supreme Court of Ohio affirmed it, and, among other things, held:

That although the decree was *in personam*, and was merely a trust in favor of Evans, the fact that the conveyance was not made in pursuance of the order did not in any way or manner affect the validity of the decree in so far as to determine the equitable rights of the parties to the land in controversy, and that all parties thereto, and those claiming under them, were absolutely bound by it; and that it was an absolute defense to the action, and cited the provisions of the Constitution of the United States as to full faith and credit being given in each State to the records and judicial proceedings of every other State.

The Kentucky Court, in default of the defendants complying with the order of conveyance, had ordered a commissioner to execute the same, and this conveyance by the commissioner was held to be wholly inoperative and void, and could not be considered as passing title to the Ohio land. This seems to have been one of the objections of the Iowa Court to the New York decree, that it did not order a commissioner to make a conveyance in default of Blackman (see Opinion, Record, 132).

This objection is fully met by this decision, and

its decree is based wholly on the simple order and decree of the Kentucky Court.

Among other things, the Ohio Court, in its opinion, says:

> "When a decree rendered by the court of a sister State having jurisdiction of the parties and of the subject matter is offered as evidence, or pleaded as the foundation of a right in any action in the courts of this State, it is entitled to the same force and effect which it had in the State where it was pronounced. That this decree had the effect in Kentucky of determining the equities of the parties to the land in this State, we have already shown, and the courts of this State must accord it the same effect. True, the courts of this State cannot enforce the performance of the decree by compelling a conveyance through its process of attachment, but when pleaded in our courts as a cause of action, or as a ground of defense, *it must be regarded as conclusive of all the rights and equities which were adjudicated and settled therein unless it be impeached for fraud.*"

This rule in equity was indirectly referred to by this Court in

Carpenter vs. *Strange*, 141 U. S., 87.

A writ of error to the Supreme Court of the State of Tennessee was under consideration, involving the effect of a decree of the Supreme Court of the State of New York.

Among other things the New York Court simply decreed that a certain deed of conveyance of real estate in the State of Tennessee was null and void, without any order or direction as against the parties.

Chief Justice Fuller, in the opinion reversing the case, while holding that in all other respects the New York decree and its findings were binding on the courts of Tennessee, yet as to that portion thereof cancelling and annulling the deed of convey-

ance to the land in Tennessee it was not binding, and among other reasons, because:

> "*No conveyance was directed nor was there any attempt in any way to exert control over her in view of the conclusion that the Court announced.* Direct action upon the real estate was certainly not within the power of the Court, and *as it did not order Mrs. Strange to take any action with reference to it*, and she took none, the courts of Tennessee were not obliged to surrender jurisdiction to the courts of New York over real estate in Tennessee."

The only inference from the foregoing authority is that *if the Court had ordered Mrs. Strange to make the conveyance, that such order would have been binding and effectual upon the courts of Tennessee.*

From the foregoing authorities we submit that on the plainest principles of equity *the decree of the Supreme Court of New York, when plead as a defense in the courts of Iowa, operated as an absolute conveyance of whatever interest Blackman may have had in the premises, the same as if the order made in the New York decree had been actually executed.* And in refusing to give to the New York decree this force and effect the Iowa Supreme Court refused to give to it the full faith and credit required by the Constitution.

III.

The Supreme Court of New York having jurisdiction of the person and of the subject matter, it must follow that its decree operated in a court of equity to divest Blackman of whatever interest, equitable or otherwise, he had in the land.

The Supreme Court of Iowa, in its opinion (Abst., 127 to 136), held that Blackman at the time of the rendition of the New York decree had divested himself of all interest in the land.

This finding is in direct conflict with the instrument under which it is claimed the title was divested.

The contract of October 6, 1892, between him and Phelan (Abst., 68–71; Transcript, 38 to 40) is the only instrument to be considered as determining the conveyance of the interest of Blackman.

The conveyance of the preceding January is conceded both in the pleadings in this case and in Blackman's answer in the Supreme Court of New York and in the evidence (Abst., 64; Trans., 36) to have been merely a mortgage to secure the payment of $75, and although in the form of a deed in a court of chancery, it must be regarded in its true character of a lien to secure this paltry sum.

The remarkable contract of October 6, 1892 (Abst., 68–71), shows that *Phelan was simply the trustee and agent of Blackman to hold the land for the payment of Blackman's debts to the amount of about* $3,000, *and that the remainder of the land or its proceeds was to be divided equally between them.*

In other words, *for the execution of a fraudulent trust Phelan is to have the half remaining after the payment of certain debts of the impecunious Blackman, and the other half is to be paid to Blackman!*

Conceding for the present to Phelan the interest

reserved under this remarkable contract, the beneficial interest of Blackman in the property was the amount of his debts to be paid, and the one-half interest remaining thereafter.

In round numbers, as shown by the evidence, Blackman's financial interest is as follows:

Total value of land, 551 acres		$24,800 00
Rental value of land for 5 years		8,200 00
Total value of property		$33,000 00
Claim of salvage to be paid by Phelan as per contract	$1,000 00	
Claim of Duffie to be paid as per contract	1,000 00	
		2,000 00
Balance to be divided between Phelan and Blackman		$31,000 00

Blackman's share in the property being $15,500, to which should be added his indebtedness of $2,000, making *a grand total of* $17,500 *as the beneficial interest of Blackman in the property, as shown by the contract of October* 6, 1892, *and which we claim was divested by virtue of the decree of the Supreme Court of New York.*

Had this contract provided that the entire proceeds of the land should be handed over to Blackman, there could be no question in a court of equity as to who was the owner; we can see no distinction between this case and one where the party is the sole and entire beneficiary of the proceeds of the property.

Where land is conveyed to a trustee for disposition, the *cestui que trust* is in equity, clothed with the ownership of the property.

Pomeroy's Equity, Sec. 374.

Where land is directed to be sold and turned into money, equity will regard the land as money, or the

money as land, as it may be necessary to carry out its purposes.

Pomeroy's Equity, Sec. 371.

It makes no difference that the defendant is only the equitable owner of the land outside of the jurisdiction; a court of equity having regard for the substantial rights of the parties will treat him as the true owner.

Baker *vs.* Rockwood, 118th Ills., 365.

It certainly is trifling with the powers of a court of equity to permit Blackman's interests in the land to escape the force and effect of the New York decree because Blackman merely made Shelton his agent to convert the property into money for him.

For all purposes, we submit that the interest of Blackman in and to the Iowa land at the time of the rendition of the New York decree, as shown by the contract of October 6, 1892, was divested, and in refusing to recognize this interest, or grant any relief to complainant, the courts of Iowa refused to give to the decree of the Supreme Court of New York that faith and credit guaranteed by the Federal Constitution.

IV.

The decree of the Supreme Court of New York bound not only Blackman's interest in the land, as shown by the contract of Oct. 6, 1892, but the entire interest of Phelan and Duffie as well, for the reason that on the pleadings it was admitted that Phelan and Duffie were purchasers without the payment of any value and with full notice of the fraud.

In the answer of Blackman to the petition of Dull in the Supreme Court of New York, he alleges

under oath (Abst. 104, par. 10) that *Phelan bought the land and paid therefor by agreeing to pay certain debts then due and owing by him to Duffie and Savage, and by agreeing to pay the balance of the purchase price, &c.* * * *

The allegations in the *cross-petition of Dull and wife* are set out on page 28 (Abstract, pars. 8 and 9), and *charge explicitly that whatever interest Phelan and Duffie or Wright acquired in and to the property by virtue of the instruments under which they claim, was wholly without consideration, and that they had actual notice of the fraud which had been perpetrated on the complainant Dull at the time of such purchase. To these affirmative allegations there is absolutely no denial.* Search all the pleadings of Phelan and Duffie, which are set out complete in the Abstract, 1-49 inclusive, and *there is no denial of this vital charge, nor is there any affirmative allegation in their petition that they were either of them purchasers for value without notice* (see pleadings of Duffie and Phelan, Abst., 1 to 50.)

It is not necessary to consider the pleadings of the defendant Wright in this particular, as his interests were cut off by the Iowa Court, and as he did not appeal, the decree is final as to him.

The pleadings referred to were the sole pleadings in issue which were before the Iowa Court, and on which its decree was based.

The fraud of his grantor being established by the decree, the burden was on Phelan, not only to allege but to prove that he was a *bona fide* purchaser for value.

Rush *vs.* Mitchell, 71 Ia., 333.

The case presents a similar condition of the record to that in

Cooley *vs.* Scarlett, 87th Am. Dec., 298.

In this case, an action was pending in the courts of Illinois to set aside and cancel the conveyance of

certain lands in the State of Michigan. The fraudulent grantees of the Michigan property were before the Court, just as in the case at bar they were before the Iowa Court. In the closing part of the opinion occurs the following:

> "There is no attempt to prove that Ritter and Perrin were purchasers for a valuable consideration, and they do not even claim to be in their answers, which are sworn to. Being thus personally within the jurisdiction of the Court, it can compel them personally to execute to Scarlett a release of all claims acquired through the deed from him."
>
> See also Caldwell *vs.* Carrington, 9 Peters, 98.

All the allegations of a bill not denied by plea or answer, stand admitted.

> Bogardus *vs.* Trinity Church, 4 Paige, 178.
>
> Zorley *vs.* Kittson, 120 U. S., 303.

> "Whenever the legal title of property is obtained under circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity imposes a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same. And *a court of equity has jurisdiction to reach that property either in the hands of the original wrongdoer, or in the hands of any subsequent holder, until the purchaser of it in good faith and without notice acquires a higher right*, and takes the property relieved from the trust."
>
> Pomeroy's Equity, Sec. 1055.
>
> Moore *vs.* Crawford, 130th U. S., 122.
>
> Perry on Trusts, Sec. 166.
>
> Russ *vs.* Mebius, 16th Cal., 350.
>
> Pomeroy's Equity, Secs. 1044, 1047.

It stood solemnly admitted by Phelan and Duffie upon the record, that *they acquired their interests*

without any consideration and with full notice of this fraud.

We respectfully submit that, on the pleadings in the case, the claims of Phelan and Duffie should have been disregarded, and the rights of Dull under the New York decree enforced as against them, and that in refusing to do so, full faith and credit was not given by the Iowa court to the records and proceedings of the Supreme Court of New York, as required by the Constitution.

V.

The judgment of the Supreme Court of New York bound not only the beneficial interest of Blackman under the contract, but the entire property, by reason of the fact that Phelan and Duffie purchased only an equitable interest in the property and they must abide the title of their grantor.

At the time of their claimed acquirement of the interest in the land, October 6, 1892, the legal title was in Wright, and on September 9, 1892, before their purchase, he had filed a cross-petition against Blackman, praying that he be decreed to be the absolute owner of the property under and by virtue of the conveyance to him by Blackman (Abst., 20-22).

The purchase by Phelan and Duffie of Blackman's interest in the land was simply a purchase of the equitable interest, *subject expressly to the litigation with Dull.*

"The purchaser of an equitable title must always abide by the case of the person from whom he buys."

Boone *vs.* Chiles, 10th Peters, 177.
Trustee *vs.* Wheeler, 61 N. Y., 88.
Hallett *vs.* Collins, 10th How. (U. S.), 174.

The purchaser of an equitable title in land takes only such interest in the property as his grantor had at the time of the purchase.

American Mfg. Co. Limited *v.* Hopper, Vol. 29, U. S. Appeals, page 24, Citing.

Caldwell *vs.* Carrington, 9 Peters, 98.

Shiras *v.* Craig, 7th Cranch, 34.

Vattier *v.* Hinch, 7th Peters, 252.

Boone *vs.* Chiles, 10th Peters, 177, *supra.*

See also

Pomeroy's Equity and authorities cited, Sections 658 and 761.

Numerous additional authorities might be cited, but these are sufficient to show the elementary character of the rule. This being so, Phelan and Duffie were in no position to set up their *bona fides* even if plead and proven against the enforcement of the New York decree, and were bound by its terms as absolutely as their grantor, Blackman, and must abide his case.

We submit that by reason of Phalan and Duffie being simply purchasers of the equitable interest, and *the title not being in Blackman at the time of the purchase*, they acquired no interests which could be successfully asserted against the equities of Dull, and in refusing to make effective the New York decree against them, the Iowa courts failed to give to that decree the faith and credit to which it was entitled under the Constitution.

VI.

The judgment of the Supreme Court of New York bound not only the beneficial interest of Blackman, but the entire property, for the reason that the contract of October 6, 1892, is in effect but a quitclaim deed.

It is elementary law that one purchasing land under a quitclaim deed is not a *bona fide* purchaser for value, and takes it subject to all equities.

An instrument conveying real property is a quitclaim when it conveys merely the grantor's title and interest in the property.

Wighton *v.* Spofford, 56th Ia., 145.

A grantee under a quitclaim acquires no rights as against outstanding equities, which are valid against his grantor.

Postel *v.* Palmer, 71 Ia., 157.
Rush *v.* Mitchell, 71 Ia., 333.
Steel *v.* Sioux Valley Bank, 79 Ia., 339.

A purchaser by quitclaim deed for an amount much less than the actual value of the property is not protected as a *bona fide* purchaser. Neither is the purchaser from him thus protected who has knowledge of the nature and consideration of the deed under which his grantor holds.

Hume *v.* Franzen, 73 Ia., 25.

The title and ownership of the property was acquired by Phelan, if at all, under the contract of October 6, 1892. Prior to that as is admitted, he was a mortgagee; he had a lien upon the property for $75, but between him and Blackman the title and ownership was in the latter.

Chair *v.* Abbott, 30th Ia., 158.
McHenry *v.* Cooper, 27th Ia., 137.

The contract did not have the effect to change or enlarge the grant of the mortgage, but operated to change the relations and rights of the parties with reference to the property. By *its* terms and *by them alone*, Phelan, who had formerly held a lien upon the property, acquired the title ownership of it. Upon the plainest principles, this must be so, for when we look for the origin and evidence of Phelan's title we must go to that contract alone, for back of it he had neither title nor ownership, and necessarily, whatever of right he now holds other than the lien created by the mortgage, was created by the contract. It seems to us that no ingenuity of argument can avoid this result.

What then is the nature and effect of the contract as a conveyance of the property? Clearly it is a mere relinquishment by Blackman to Phelan of whatever right or interest he then held in it subject to the litigation. Those are its terms, and that is its effect, and the law impresses no other character upon it. It contains no assurance of title or other covenants, nor does it make the slightest reference to those contained in the mortgage. Any stipulation in an instrument which was evidently intended by the parties to operate as a conveyance, will be given that effect; but *a covenant of warranty can be created only by express terms.*

Phelan, then, is in the position of one holding under a quitclaim deed. By no ingenuity can he be put in any other or better position than that. If he were to sue for a breach of the covenants contained in the mortgage, the measure of his recovery would be the $75 paid by him as consideration for those covenants, and he has no others. The stipulation in the contract that the mortgage should become an absolute conveyance did not, as we contend, have the effect to enlarge the scope or power of that instrument, but it operated *propia vigore* to transfer the title, and as it contains no reference to the covenants in the mortgage, it is impossible that they

should attach to or become a part of the conveyance.

We invite the closest scrutiny of the contract, for we are confident that our interpretation of it is correct. We need not cite authorities to show that one holding under a quit claim or other conveyance having only the force and effect of a quit claim is not an innocent purchaser of the property, but takes only such interest as his grantor had, subject to any equity which was good as against the grantor.

We submit that for these reasons the Courts of Iowa failed to give to the decree of the Supreme Court of New York the full faith and credit to which it was entitled under the Constitution.

VII.

The decree of the Supreme Court of New York bound not only Blackman's beneficial interest in the land under the contract of October 6, 1892, but the entire property as well, for the reason that not only was it admitted in the pleadings, but it was admitted and shown by the evidence that neither Phelan nor Duffie paid any value, and whatever interest they acquired was taken with full knowledge of the equities of Dull.

As before contended (Par. III.) in cases of fraud a court of equity has power to reach the property either in the hands of the original wrongdoer or in the hands of any subsequent holder without limitation until a purchaser for value without notice of the fraud is found.

Pomeroy's Equity, Secs. 1044 and 1055.
Moore *vs.* Crawford, 130 U. S., 122.

In other words, we claim that a court of equity will disregard mere forms of speech or writing and

grasp the very right of the transaction, and will follow the title through all the devious mazes of fraudulent dealings until it has found one who has paid value for the land without notice of the fraud. This is the only barrier which can be successfully interposed to the powers of a court of equity.

The fraud of Blackman having been established by the decree, it was incumbent on Blackman not only to allege, but prove by a preponderance of the evidence that he was a good faith purchaser for value.

Rush *vs.* Mitchell, 71 Iowa, 333.

Is this man Phelan, to whom the Iowa court has given this valuable property, an innocent purchaser for value?

Is he the adamantine rock of innocence which stands as a barrier to the exercise of the remedial powers of a court of equity?

We respectfully submit that, from the record, these questions must be answered emphatically in the negative.

(1st.) He was charged with full knowledge of the fraud. He admits that he never saw the land or made any inquiry as to its value or as to the title (Abst., 62-63; Tr., 35). That he took the land at Duffie's request as a speculation (Abst., 63 and 162; Tr., 35 and 92). That *Duffie was his attorney and agent on whom he implicitly relied as to title and value and everything in connection with the land,* and although he lived in the City of Omaha, within 15 miles of the land, he never inspected it or made any personal inquiry in regard to it.

Duffie was his trusted agent in the whole series of transactions by which he claims to have acquired title (Abst., 63-66; Tr., 35 to 37).

This being so, *whatever knowledge Duffie pos-*

sessed as to the equitable rights of Dull would be imputed to Phelan.

See

Shoemaker *vs.* Smith, 80th Ia., 655.
Crum *vs.* Davis, 54th Ia., 25.

"In the purchase of land the principal is affected by the previously acquired knowledge of his agent, if the agent had that knowledge in mind at the time of making the purchase."

Brown *v.* Cranberry Iron & Coal Co., Vol. 25, U. S. Appeals, 679.

"If the agent, at the time of effecting a purchase, has knowledge of any prior lien or trust or fraud affecting the property, no matter when he acquired such knowledge, his principal is affected thereby."

Distilled Spirits, 11th Wallace, 356.

The deed of Dull to his wife (Abst., 50) was filed September 22, 1892, almost two weeks before the contract of October 6, 1892, was executed, and charged the uncle with notice that Dull still claimed to own the land.

In February, 1892, at the Chicago meeting long before the contract of October 6, 1892, was entered into, Duffie was fully advised as to the nature and extent of the claim asserted by Dull to the land. He admits in his testimony that at this meeting Dull advised him fully as to the fraud of Blackman perpetrated upon him (Abst., 126-139; Tr., 72 to 79). That he characterized the transaction at that time as "high swindling," and told Blackman that he ought to give Dull back his land and pay him for all damages he had sustained by reason of the fraud (Abst., 158-160; Tr., 90 and 91).

The evidence of Dull and Burdick as to what was said and done at the Chicago meeting, in the presence of Duffie (Abst., 126-138 and 126 and 140; Tr., 72 to 79) is wholly uncontradicted. The whole New York fraud, in all its hideousness, was gone over. Black-

man was tearfully repentant, and just as soon as he could wrest the title from Wright in the suit he had just begun, he would reconvey the land to Dull. This agreement was never abrogated, and Duffie, without further light or inquiry, procured thereafter the execution of the contract on which Phelan's title and his is based (Abst., 161-162; Tr., 91 and 92), which provided that Phelan was to carry on the litigation against Dull and Wright.

There can be no question, from the evidence, but that Duffie and Phelan entered into the arrangement with Blackman with full knowledge of the fraud, and with the set design and purpose of beating Dull out of his land.

No more cunning act of duplicity is shown in the record than the fact that while in Chicago, in February, 1892, Blackman was shedding crocodile tears of repentance and promising to convey to Dull the Iowa land and make full reparation for the New York fraud, with Duffie present as his attorney, they, Blackman and Duffie, as attorney in fact for Blackman's wife, had already but a few days before (Jan. 30, 1892, see Abstract, 50; Tr., 28) signed and delivered what purported on its face to be an absolute conveyance of the property to Phelan.

All this was studiously concealed from Dull, and yet, in the face of the undisputed record, that he only a week before had signed Mrs. Blackman's name to the deed as attorney in fact, Duffie swears, on his oath on the trial, that he did not know that Blackman had given Phelan a mortgage or a deed until he and Blackman went to the train to go home after parting from Dull (Abst., 160; Tr., 91).

And this same Duffie, in his sworn answer (Abst., 44; Tr., 24 and 25), goes with great particularity into the details of the alleged settlement at Chicago —then, as a witness on the stand (Abst., 160; Tr., 91), he coolly swears that Blackman and Dull "did not tell him the details of any settlement," and subsequently when the contract of October 6, 1892, was made, he never asked Blackman whether any

settlement had been made between him and Dull. although he admitted that no communication had been had between them on the matter since the Chicago interview (see Abst., 161; Tr., 91).

In verifying the amendment to Blackman's petition, October 13, 1892, Duffie swears in substance *that Blackman was then the owner of the Iowa land, when only a month before*, September 17, in verifying Phelan's petition in intervention *he had sworn that Phelan was the absolute owner.*

When his attention was called to these facts on cross-examination, he had to admit that he could not explain his conduct (Abst., 161; Tr., 91).

No wonder that Duffie sums up his remarkable record as a witness in the case with the candid statement: "It seems more like a dream to me; I don't want to testify positively about it" (Abst., 162; Tr., 92).

A court of equity, where the sacred rights of property are concerned, surely does not formulate its decrees on dreams, and the theories of dreamers, and we submit that, on the record, this man Duffie and his puppet Phelan should not for one instant be permitted to hold up their flimsy pretentions as a shield against the enforcement of the decrees of a court of equity.

(2.) Not only did Phelan and Duffie have actual notice of the fraud, but *they paid no value.*

It is elementary law that to constitute a *bona fide* purchaser he must have obtained the property not only without notice, but *must have paid value.*

> "Actual payment of money is necessary to the character of a *bona fide* purchaser for value. The giving of security and executing a note is insufficient."
>
> Kittredge *v.* Chapman, 36th Ia., 348.

January 30, 1892, Phelan claims to have paid Blackman $75 for a deed of the property, which was

merely as mortgage security (Abst., 58; Tr., 32). This is the only payment made direct. He claims to have made other payments to Duffie on attorney's fees and other matters, but cannot tell what ones were to apply on the land deal, and what on Duffie's fees (Abst., 65-66; Tr., 36 and 37).

Duffie himself is wholly at sea on the question of payments. Outside of the claimed payment after summons in the New York suit of a copy of Dull's complaint and order of injunction had been served on them, December 24, 1893 (T., 42), outside of the $75 paid January 30, 1892, no other payment is shown to have been made by Phelan but $75, in return for $25,000 consideration.

By the contract of October 6, 1892, Phelan merely undertook to pay the indebtedness of Blackman to Duffie and Savage out of the proceeds of the property, in case he got it at the end of the litigation, of which he was apprised, and which was then in contemplation, and to account to Blackman for one-half of the residue.

All of these undertakings were executory, revocable, and none of them have ever been performed. Agreements such as these do not entitle the parties to protection as holders for value.

See Pomeroy's Equity, Sec. 751.

> "A pre-existing debt is not a consideration which will support a *bona fide* purchaser."
> Phelps *v.* Fockler, 61 Ia., 340.

The debts referred to in the contract were all of prior existence and long standing.

> "An innocent purchaser will be protected only to the extent of partial payments made."
> Merrill *v.* Tobin, 82 Ia., 535.

If Phelan had paid anything, under this decision he should have been allowed a lien to the extent of his innocent investment in the transaction instead of being given the entire property.

But he paid nothing. The only consideration was his undertaking to pay certain debts of his dependent Blackman, not one of which he has ever paid; and by the subsequent contract (Abst., 180; Tr., 102), his liability to pay them at all is made to depend upon his ability to cheat Dull out of the land.

His hands are unclean; he was in a court of conscience, seeking by its decrees to gather the fruit of frauds, of which he had notice, both actual and constructive. He paid no consideration, and was under no obligation to pay any unless he should succeed in consummating the frauds of his grantor.

We respectfully submit that the Supreme Court of Iowa, in recognizing that Phelan and Duffie had any rights as against the enforcement of the New York decree, failed to give to the decree of the Supreme Court of New York that full faith and credit to which it was entitled under the Constitution.

VIII.

It will be noted that the opinion of the Iowa Supreme Court closes with the following declaration:

> " The decree therefore of the District Court is in all respects affirmed."

This decree which thus becomes final in Iowa against our clients, is set out in full on pages 185–190 abstract (Tr., 105 to 108).

This decree is not based on any findings as to the *bona fides* of Phelan and Duffie; it defeats the claim of Wright, and gives to Phelan the entire property, and this finding is based solely on the grounds that:

(1.) Dull did not offer to return the mortgage or deed of the New York property.

(2.) Acquiescence in the fraud which Blackman had practiced upon him.

Whatever constitutional rights Dull may have had under the proceedings of the Supreme Court of New York are utterly ignored and held unworthy even of reference.

That these questions of fraud and laches and tender were adjudicated and determined by the New York decree there cannot be the slightest doubt.

The question of the failure to return the deed and mortgage was expressly in issue (Abst., 96-105; Tr., 54 to 60). The doctrine of acquiescence and laches was embraced therein in the general issue; also the question that Dull had conveyed the lands to his wife. (This latter defense, which the Iowa Supreme Court in its opinion refers to as rendering void the New York decree, is fully explained by the testimony of Dull (Abst., 87; Tr., 49). that this conveyance was simply for the purpose of giving notice to the world that he stillasserted ownership of the land; as between himself and wife, by a contract of reconveyance between them, he was the owner of the land, entitled to maintain an action, and both he and Mrs. Dull were in the Iowa court, the one asserting and the other assenting to this proposition, and no other person was entitled to gainsay or deny the existence of such facts of title.)

Not only were these matters in issue and adjucated, but *all other matters which might have been plead as a defense thereto were settled and adjudicated in favor of Dull.*

> " An adjudication is final and conclusive not only as to matters actually determined but as to every matter which the parties might have litigated and have had decided as incident to or essentially connected with the subject matter of the litigation and every matter coming within the legitimate purview of the

original action, both with respect to matters of claim and of defense."

Freeman on Judgments, Sec. 249.
Dewey *v.* Peck, 33 Ia., 242.
Lawrence *v.* Stevens, 46th Ia., 429.
Maloney *v.* Horran, 49th N. Y., 115.
Cromwell *v.* County of Sac., 94 U. S., 351.
Case *v.* Beauregard, 101 U. S., 688.

"A judgment and decree affirming the existence of any fact is conclusive upon the parties or their privies whenever the existence of that fact is again in issue between them, not only when the subject matter is the same, but when the point comes incidentally in question in relation to a different matter in the same or any other court."

Freeman on Judgments, Sec. 249.

This decree of the District Court, which is the finality of the opinion of the Supreme Court of Iowa, surely fails, under the authorities cited, to give any faith or credit whatever to the decision of the Supreme Court of New York, and is in violation of the constitutional rights of plaintiffs in error.

IX.

A careful examination of all the authorities cited in the brief filed in favor of the motion to dismiss the appeal herein, on the ground that there were other questions involved in this case besides the Federal question, which were of themselves sufficient to control the decision and thereby oust the jurisdiction of this Court in this case, shows that all such cases were entirely different in fact from the case at bar. In this case it is very clear that each and all of the questions adjudicated were passed

upon and controlled by the decision in the New York Supreme Court, and were interwoven therewith.

X.

The statement on page 11 of the brief, contra-criticising the action of the plaintiff in this case, in that he sought to have his day in court on certain issues, &c., is easily answered by the statement and proposition that he had a perfect right when he appeared in the Iowa court to plead the New York proceedings in abatement, and that being overruled he could, without injury to the right he had thereby reserved out of abundant caution, present as many distinct and independent defenses as he desired, without bringing the case within the principle of Federal law relied upon by the defendants in error.

When he reserved his rights he was entitled to have the benefit of them, and he did not in any way waive them by going into a further trial of the merits of the case, and this Court will certainly accord to him the full protection afforded by the Federal law.

XI.

The attorneys of record in the case in the United States Supreme Court having appeared and accepted service for all the defendants, among whom was named John E. Blackman, there can be no doubt that he is a party to this action, bound by the decision of the Court which may be made herein, which decision also will bind and affect all the other parties defendant who claim through him either directly or indirectly.

The doctrine is too well established in all parts of the United States to need any extended argument to show that when attorneys appear or accept service for a party, the Court will presume that they had full authority so to appear or accept service and the party will be bound by their action in the suit.

A few authorities establishing this doctrine beyond question are as follows:

Hamilton *vs.* Wright, 37 N. Y., 502.
Davis *vs.* Bowe, 118 N. Y., 55, at page 61.
Vilas *vs.* R. R. Co., 123 N. Y., 440.
Marling *v.* Roberts, 13 W. Va., 440.
Ingram *v.* Richardson, 2 La. Ann., 839.
Hendrix *v.* Cathron, 71 Ga., 742.

XII.

The injunction which was granted in New York made it utterly impossible for Blackman or his co-conspirators, who were really simply himself in another form, to proceed with the action at all. Of course they could do so as a matter of physical fact and have done so as voluminous papers in the record amply show, but his acts and their acts were absolutely void *ab initio* from the time that injunction was granted. Not only was Blackman liable to be punished for contempt within the State of New York by the Supreme Court for so permitting the suit to be prosecuted by his dummies in his interest but the suit itself was absolutely void; it was without a plaintiff, and it has been proceeding with only one side to it, and without any real legal existence, and the decree therein entered is absolutely void and should be so declared by the Supreme Court of the United States.

A case very similar to the one at bar is

Cunningham *vs.* Butler, 142 Mass., 47.

This was a case of injunction against suit in another State. The syllabus is as follows:

" A citizen of Massachusetts, with knowledge that " his debtor residing there had stopped payment, " and anticipating proceedings in insolvency, as- " signed his claim to a citizen of another State, " without consideration, and the latter, *before pro-* " *ceedings* in insolvency *were begun sued* upon the " claim in said other State, and attached property " of the debtor there. On a bill in equity by the " assignee in insolvency of the debtor, held, that A " should be restrained from prosecuting the action " to judgment, if A has control of the action."

In that case a citizen of the State of the forum assigned his claim to a party outside of the State in order that proceedings in the foreign State might be taken upon it in contravention of the law of the forum.

Farnsworth *vs.* Fowler, 1 Swan, 1 (Tenn.), holds both that a party is bound by injunction from the time he has notice of its issuance and also that any act in violation of the injunction being unlawful is to be deemed invalid, ineffectual and unavailable as to the purpose intended as though it had not been done. The Court said:

" As to the effect of the writ, we may observe that " it is directed to the defendant, and its action is " upon him *in personam*, and it renders it unlawful " in him to do the thing therein prohibited, or to " fail or omit to do the thing therein commanded. " The act being unlawful, it is to be deemed inef- " fectual and unavailable, as to the purpose intended, " as though it had not been done; or, if that may " not be, on account of the intervention of the " rights of innocent persons, who had no knowledge " or information of the injunction, the defendant is " liable to make indemnity for this unlawful act to " the party injured."

In the case at bar it cannot be claimed that any good faith purchasers came into the title without notice. Whatever has been done by Phelan and Duffie can be taken to be the acts of their assignor, Blackman, for they had full notice of everything and did not pay value.

XIII.

An injunction becomes binding upon both the defendant and his agents and other parties connected with him either directly or indirectly and all parties against whom it is directed as soon as it comes to their knowledge, even though it may not be served in exact accordance with the strict rules and provisions of law.

Wimpy *vs.* Phinizy, 68 Georgia, 188.

The injunction was granted against the defendant, his agent, &c., restraining them from interfering with a certain house. Defendant's attorney interfered with the house, contending that he, after the injunction, had ceased to act as attorney for defendant and that his interference was in behalf of a stranger to the suit. He was held to be in contempt.

Cape May R. R. Co. *vs.* Johnson, 35 N. J. Equity, 442, notice of the granting of the injunction was given by telegraph. It was held a sufficient notice in the case, and it has also been held that all parties who act in contravention of the injunction are acting illegally and are liable to punishment whether the service upon them is fully made or not, provided they act with full knowledge.

See

Parker *vs.* Russell, 2 Lansing, 242.
Gibbs *vs.* Morgan, 39 N. J. Equity, 79.

See the following cases:

Thebau *vs.* Canova, 11 Alabama, 143.
Fowler *vs.* Farnsworth, 1 Swan (Tenn.), 1.
Cumberland Co. *vs.* Hoffman, 39 Barbour, 16.
Taylor *vs.* Hopkins, 40 Illinois, 442.
Ogden *vs.* Gibbons, 4 Johns. Chancery, 174.
Endicott *vs.* Mathis, 9 N. J. Eq., 110.

XIV.

We have thus presented in detail the various reasons why we contend that the rights of plaintiffs in error, under the Constitution, were disregarded by the Iowa Courts.

The conveyance of Blackman had been adjudicated as fraudulent and void, and it was only the fleshless skeleton of a legal title left in him which was ordered to be turned over, and in any court of equity this would be decreed to have been done wherever and whenever the question should arise as to the relative rights and interests of Blackman and Dull in and to the property involved.

The fact that fraud had been established was beyond reversal, and *whatever results naturally followed from the existence of such a finding, our clients had a constitutional right to that result.*

As to Blackman, it was as if the Iowa Court had made the New York decree and in that jurisdiction; there was no longer any issue on the fraud question as between Blackman and Dull, and whatever of shadow or of substance Blackman retained in the property belonged to Dull, and was to be treated as his property. This necessarily entitled Dull to a

decree of the Iowa Court establishing in him whatever right, title or interest in the land, legal or equitable, remained unconveyed to a *bona fide* holder for value.

In any view of the case, under the contract of October, 1892, of Blackman with Phelan, a large interest still remained undisposed of and subject to such a decree after the cancellation of the Wright interest. The Wright interest was eliminated by the decree of the Iowa Court from the contract of October 6, 1892, Phelan having elected to contest the same, and Wright not having appealed, his interests are completely eliminated from the controversy.

It is not claimed that Phelan or Duffie were parties to the frauds complained of and adjudicated in the New York action, and their rights are not at all dependent upon any participation or non-participation therein, and as these frauds were confined to Blackman and had been specifically passed upon, all that was permitted to be proved on the trial of the Iowa suit on the subject of fraud, except the introduction of the New York judgment roll to show that that issue had been settled, was entirely immaterial, and all that was said on that subject by the Iowa Court was irrelevant.

As to Phelan and Duffie (Savage was not a party to the suit, had no connection therewith and the reference to him in the opinion of the Iowa Supreme Court is wholly unwarranted), the only legitimate question was, did either of them stand in relation to the Iowa land as a purchaser for value and without notice, and upon the evidence, and the law as applicable to it, as we have endeavored to show, that issue was as plain upon that question as it was upon the question of fraud, because, as shown by the Record:

(1.) The pleadings admitted that they were not purchasers for value, and that they had full notice of the fraud.

(2.) By the contract of October, 1892, they bought merely the equitable title and a lawsuit, as by its terms expressly stated.

(3.) The contract of October, 1892, was in effect a quitclaim deed and afforded them no protection against the equities of Dull.

(4.) Because the evidence, without contradiction, shows that they had actual notice of the fraud and paid no value for the interests acquired.

(5.) Because by proceeding in violation of the injunction the defendants in error have accomplished nothing in law.

It may be contended that inasmuch as the Iowa Court did not in terms overrule the New York decree, that the case was decided on other grounds than the Federal question, and so the judgment must stand.

> "The Court will look to the record, and not to the opinion, to determine whether a Federal question was decided."
>
> Gibson *v.* Chouteau, 8th Wallace, 314.

As before urged, although not overruling the New York decree in express terms, the decree of the Iowa Court at every point utterly disregarded it, and formulated its findings of fact and conclusions of law in direct opposition to and in defiance of every finding of fact and conclusion of law of the New York Court.

That a Federal question was in the case, and that the constitutional rights of our clients were disregarded, it seems to us is too plain to need argument. The Iowa Court could not have rendered the decision it did without deciding against the validity of the New York judgment.

> "The jurisdiction is maintainable if the case shows that Federal questions were in-

volved, though it also appears that there were other defenses, *if these defenses afford no legal answer to the suit.*"

Maguire *v.* Tyler, 8th Wallace, 651.

"And this is so, even though the case may have been disposed of generally by the Court on other grounds."

Minnesota *v.* Bachelder, 1st Wall., 109.

The jurisdiction of the Court existing by reason of the Federal question, the decree of the Iowa Court—

"* * * may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States, 'and the Supreme Court may reverse, modify or affirm the judgment or decree of such State Court, and may, at their discretion, award execution or remand the the same to the court from which it was removed by the writ.'"

See

Revised Statutes United States, Sec. 709.

Desty's Federal Procedure, 332.

This brings up for review not only the interest still retained by Blackman under the contract of October 6, 1892, but the position of Phelan and Duffie in the record and the untenableness of their position as set out in our preceding argument, the same as though a decree had been rendered in a court of equity in a Federal Court sitting in the State of Iowa.

The consideration of these matters involve merely questions of general equity law; they are not based on any statutes, either of Iowa or New York, and, the record being shown, the necessary and logical results arising therefrom must be considered by this Court in the determination of the suit.

If full faith and credit had been given to the New York judgment not only would it have required the Iowa Court to have rendered a decree in favor of our clients for more than half of the property by reason of the interest retained under the October contract, but also as against the flimsy pretensions of Phelan for the entire property.

In Conclusion.--It seems to us that no one can read the record without being strongly impressed with the fact that a gross fraud and injustice has been perpetrated.

Our clients, unused to the ways of these Western adventurers, like the man who in olden time went down to Jericho, have fallen among thieves. They have been deprived of property whose value and rentals exceed the sum of thirty thousand dollars, without receiving one dollar of consideration. By the low cunning and duplicity of Blackman they have been deprived of even the shadow of consideration promised for the Hopper interest in the Lyon lot in New York.

When he has successfully invoked the relief accorded by a court of equity in his native State against the wrongdoers and seeks thereunder to reinstate himself in the possession of the Iowa land of which he had been defrauded, he is met with the assertion of the trial Court in Iowa, "*Your New York decree is not worth the paper it is written on*," and under the sanction of the Supreme Court of Iowa the whole valuable property with five years' rentals is turned over to one Phelan, the "*alter ego* of Blackman," who, with full notice of the fraud and without the payment of any consideration, is to pay some of the chief conspirator's (Blackman's) debts, including the fees of his attorney Duffie, for his assistance in consummating the fraud on Dull, and divide what is left between them.

In other words, for his manipulation of the fruits of the fraud, Phelan is to get the benefit of this

division of the property, in case the fraud is successfully consummated.

The District Court of Iowa, in considering the fraud of these conspirators, and while recognizing the strong equities of our client, said, in rendering its decision, "*I would like to beat this gang, but do not see how I can do it.*"

Surely a court of equity, in whose hands lie all the remedial powers of the ages, should not thrust from its doors a suitor pursued by the emissaries of fraud, or be heard to say that it is powerless to protect him.

We submit that on the record the Iowa Court should have rendered a decree in favor of the plaintiffs in error for not only Blackman's interest in the property, as shown by the contract of October 6, 1892, but for the entire interest against all of the defendants, and that the decree of the Iowa Court should be reversed and the case remanded ordering the Supreme Court of Iowa to enter such decree.

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Of Counsel.

Supreme Court of the United States.

DANIEL DULL AND NELLIE M. DULL, Plaintiffs in Error, AGAINST JOHN E. BLACKMAN, EDWARD PHELAN, EDWARD R. DUFFIE AND GEORGE F. WRIGHT, Defendants in Error.	No. 192.

Supplemental Brief on Behalf of Plaintiffs in Error.

I.

ASSIGNMENTS OF ERROR.

1st. The court erred in paragraph 2 of the opinion in investigating the evidence of fraud between Dull and Blackman and holding that the fraud had not been established, for that the question of fraud had been expressly adjudicated and determined as between these parties by the supreme court of New York.

2nd. The court erred in paragraph 3 of the opinion in holding that the New York decree did not settle the title to the Iowa lands as between the parties thereto.

3d. The court erred in par. 4 of the opinion in holding that Blackman, at the time of the trial of the New York suit, had divested himself of all interest in the Iowa land.

4th. The court erred in par. 4 of the opinion that by the New York decree Dull obtained no rights as affecting his interest in the Iowa land.

5th. The court erred in par. 4 of the opinion in holding that the rights of Phelan and Duffie were not in any manner affected by the New York decree.

251 6th. The court erred in par. 4 of the opinion in holding that *the* the New York court by its decree had no jurisdiction to affect the title or equities relating to the Iowa land.

7th. The court erred in par. 4 of the opinion in holding that unless the conveyance was made under the New York decree the title to the Iowa land could not be affected thereby.

8th. The court erred in par. 5 of the opinion in holding that Dull had acquiesced in the fraud of Blackman, for the reason that all the matters relating thereto had been expressly adjudicated by the New York decree.

9th. The court erred in par. 5 of the opinion in holding that Dull was concluded by laches and acquiescence in the fraud of Blackman, for the reason that these matters, as well as all other matters in the controversy between Dull and Blackman, had been expressly adjudicated by the New York decree.

10th. The court erred in par. 6 of the opinion in holding that Dull, notwithstanding the adjudication of the New York supreme court, had been guilty of laches and acquiescence in the alleged fraud, and that by reason thereof was barred of any recovery.

11th. The court erred in holding in par. 6 of the opinion that Phelan, Savage, and Duffie were in no manner affected by the New York decree.

12th. The court erred in holding in par. 6 of the opinion that Phelan, Savage, and Duffie had acquired interests in the Iowa land which entitled them to protection.

13th. The court erred in holding under the pleadings and evidence that Phelan, Savage, and Duffie had any other or different interests in the Iowa lands than their fraudulent grantor, Blackman.

14th. The court erred in refusing to give to the decree of the supreme court of New York the full faith and credit to which it was entitled under section I, article IV, of the Constitution of the United States.

15th. The court erred in refusing to give to the decree of the New York supreme court the full faith and credit to which it was entitled under section 905 of the Rev. Statutes of the United States.

16th. The court erred in not entering up a decree in favor of appellants as prayed in their cross-petition.

II.

It is urged by the defendants in error, that Blackman has disappeared from the litigation through the intervention of Phelan and that only Phelan, Duffie and Wright have any interest in the decree complained of. The decree itself, however, shows that it was rendered in a cause in which Blackman was named as the party plaintiff, and besides it appears that the decree was for his benefit to the extent that it provided at least for the payment of some of his debts. So he was nominally and actually interested in it.

Blackman was in both the Iowa courts served with notice of appeal (108) represented by counsel who appeared and filed "Appellee's Abstract" in his name (111) and in the arguments and the citation of this court was duly served upon him (139).

From the inception of this case to the present time jurisdiction of Blackman has been retained at every step in the proceedings, and his presence here cannot be ignored.

The judgment of the Supreme Court of New York was plead not only in the cross petition as alleged, but in *both the answer* and *cross petition* as a basis of defense as well as for *affirmative* relief. It was brought into the record directly in answer to the amended petition which was *filed by Blackman* and *verified by Duffie almost thirty days after Phelan's petition of intervention was filed.* (7–11.)

It is claimed by defendants, p. 15, brief, that the court found that there was no judgment against Phelan in New York, and hence. the federal question was eliminated.

As the trial court took occasion to assert that "the New York decree was not worth the paper it was written on," counsel might as well have gone further and said that there was no judgment there against Blackman. It is this studied ignoring of the New York proceedings and judgment of which we complain and the whole argument *contra* seems to be based upon a circuitous reasoning which starts with the assumption that this New York case which was fought to a conclusion upon full pleadings, testimony and argument, and in which that court arrived at a final judgment favorable to the plaintiff in error was without a legal status and the judgment had no binding force on any one.

III.

We have already cited and commented upon the case of Burnley *vs.* Stephenson, 24 Ohio St., 74, and call attention to the fact that this case was cited with approval in the case of Harris *vs.* Ins. Co., 97 U. S., 336.

On the question of the finality of the New York decree as to the equities existing between Dull and Blackman, we wish to call attention to the syllabus in Swihart *vs.* Shaum, 24 Ohio St., 432.

A judgment in the absence of fraud or collusion is

conclusive evidence both as to the facts and the amount of indebtedness not only as between the parties to the judgment, but *as between and against the parties to whom the judgment debtor has conveyed the property sought to be subject to its payment*, and *this conclusive effect of the judgment is not affected by the fact that it was recovered after the conveyance of the property.*

The language of the Court is more explicit:

"The ground relied on is that the plaintiffs in error are not bound by the judgment because it is said they are not in privity with the judgment-debtor. We think otherwise. They claim the land in controversy under the judgment-debtor and are thus in privity with him. At the time of the conveyance the land was liable for the payment of the debts of the grantor. The conveyance being voluntary the grantees took the property, subject to the right implied by law in existing creditors, to have it appropriated to the payment of such demands as might, in good faith, be adjudged in their favor against the grantor."

* * * * * * *

"In our view, the judgment is not only conclusive as between the parties to it, but as between and against the parties to whom the judgment debtor had conveyed the property sought to be subjected to its payment, *and this conclusive effect of the judgment is not affected by the fact that it was recovered after the making of the conveyance.*"

See, also, 45 N. Y., 245.

Where a court of general jurisdiction exercises its powers upon a state of facts to be proven before it, the proof is presumed to have been made and *the existence of the fact cannot be collaterally denied.*

Pilsbury *vs.* Dugen, 9 Ohio, 117.

Maxson *vs.* Sawyer, 12 Ohio, 195.

If the court has jurisdiction of the parties and subject-matter, its judgment, however irregular or erroneous, is binding until reversed and neither it nor the title acquired under it can be attacked collaterally.

Bigelow *vs.* Bigelow, 4 Ohio, 138.
Douglass *vs.* McCoy, 5 Ohio, 522.
Calkins *vs.* Johnson, 20 Ohio St., 539.

Though party was not a privy a judgment may be introduced as a link in a chain of title.

Barr *vs.* Gratz, 4 Wheat., 213.

Decree in equity is binding on parties and their privies with notice.

Minn. Agl & Mech. Ass'n *vs.* Canfield, 121 U. S., 295.

Trustees and privies are bound by decree.

Green *vs.* Bogue, 158 U. S., 478.

After a decree establishing the invalidity of a deed the grantee cannot set up a title acquired through such deed. Where a court having jurisdiction of a case has framed a decree upon a certain issue, such issue can not be retried in a collateral action.

Franklin County *vs.* German Savings Bank, 142 U. S., 93.

Under Code Nebraska, Section 429, a judgment rendered for a conveyance in a State Court, not complied with by the parties within the time limited, *has the same op ration and effect as if the conveyance had been executed pursuant thereto.*

Langdon *vs.* Sherwood, 124 U. S., 74.

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No. 192.

Reply Br. of Flickinger & Safford for P. E.

Supreme Court of the United States.

Filed Jan. 17, 1898.

DANIEL DULL and NELLIE M. DULL,
Plaintiffs in Error,

AGAINST

JOHN E. BLACKMAN, EDWARD PHELAN, EDWARD R. DUFFIE and GEORGE F. WRIGHT,
Defendants in Error.

No. 192.

Brief in Reply by Plaintiffs in Error.

In this brief, which is filed in reply to that of Defendants in Error, we have followed the order of argument and subdivisions of that brief.

1. We have not contended that the New York decree was *in rem*; nor was the New York judge who signed the decree misled as to the service on the defendants. It had been expressly ordered by that Court that service should be made by publication or delivery of a copy to the non-resident defendants outside of the jurisdiction, which was done (42–43).

2. The contention that when the New York decree was obtained Dull had no interest in the land by reason of the previous conveyance to his wife proceeds also upon a false assumption of the law governing such cases.

Blackman made this defense in his answer in the New York Court (56–60), and that issue was decided against him.

It was never claimed that the conveyance to his wife was a parting with any substantial interest. The conveyance was made solely for the purpose of giving the world notice on the public land records that he was still asserting title to it (49).

Dull was in equity the owner (Cotton *vs.* Wood, 25 Iowa, 33); the real party in interest, as argued by defendant's counsel, and the proper party to bring the action. The decree of the New York Court must be considered as final as to this subject and it does not lie in the mouth of Blackman, Phelan & Co. now to gainsay it.

Besides, Dull and his wife are both in this case asserting such to be the fact and both assenting to it.

Even if the conveyance had been considered absolute between them, Dull, as warrantor or for the protection of his tenancy interest, had a right to prosecute this action in his own name.

3. The claimed rule in Swann *vs.* Clark, 36 Iowa, is not sustained by the opinion and is not applicable to this case. That cause was dismissed by the appellate court because the plaintiff could not obtain the relief asked for reason that the real party in interest was not before the Court.

If the judgment had not been reversed but sustained, as decided in the District Court, it could not have been considered as a nullity between theparties, particularly if it appeared, as in the case at bar, that the defendant in Court retained the lion's share of the property.

It is said "that at the date of the rendition of the

decree Blackman had previously disposed of all his interest in the subject-matter of the action."

This assumes that the contract of October 6, 1892 (38), was, in equity, such a conveyance, and that Blackman thereby parted with all beneficial interests; that is not so, but what the contract contemplated is best shown by its terms, and the interest still retained by Blackman is discussed in paragraph 3, page 22, of our opening brief.

The claimed rule is not supported by the authority of Massie *vs.* Watts and the other citations in this subdivision; but on the contrary, they sustain the rule which we contend for.

4. It is claimed that the New York case does not come under the exception of fraud, trust or contract, as laid down in Massie *vs.* Watts. The pleadings in the New York case are fully set out in the record (Complaint 43; Amended answer 56–60), and show that fraud and concealment arising from misrepresentation and double-dealing were the bases upon which that case proceeded.

It is claimed that "failure to deliver consideration never invalidated a deed," and Lake *vs.* Gray, 35 Iowa, 459, is cited as sustaining such a rule.

If that case is to be considered as determining the proposition contended for (as may well be doubted), then it may safely be said that the Supreme Court of Iowa has overruled that decision and the learned counsel evidently forgets the case he is arguing here, in which the deed of Blackman to Wright was canceled, upon the pleading that there was failure to deliver the consideration upon which the deed was executed. (See Record, 105).

5. This subdivision again falsely assumes that Blackman had parted with all his interest in the land, and asserts that the New York decree is void and of no more value than so much waste paper even as to Blackman.

This is but a continuation of the untenable claims of counsel. A Court of Equity disregards mere form and looks only to the substance of things.

The pickpocket has usually a confederate near him to whom, for the purpose of escaping detection, he passes the stolen purse that the plunder may be divided at their leisure. As applied to this case, counsel has shown an utter inability to comprehend the relationship existing between the principal and the confederates in the appropriation of plaintiff's land.

6. It is claimed that by reason of a failure to file a petition for rehearing, the judgment of the Supreme Court of Iowa was not final. We admit that by a clerical error, the clerk of the Supreme Court of Iowa omitted from the record (as certified) a statement of the filing of such a motion and the argument and judgment thereon. The fact of this omission from the record in this court did not come to knowledge of counsel until the filing of the brief for the defendants in error. But we assert that such a motion was duly filed, heard and decided, and we rely upon the indulgence of the court, should this matter be considered to be of importance, to give us an opportunity to correct the record in this respect.

In conclusion "privity in estate is where there is a mutual and successive relationship in the same rights to property. * * * Privies are bound because they have succeeded to some estate or interest which was bound in the hands of the former owner."

(Freeman on Judgments, Section 162.)

The voluntary grantee of land without payment of consideration before suit brought and judgment rendered is in privity with his grantor and bound by the judgment subsequently obtained against him.

(Swihart *vs.* Schaun, 24 O. St., 432.)

As shown by paragraphs 1-8, pp. 14-37, of our opening brief, the claimed conveyance to Phelan was *voluntary* within the meaning of this term; that is, without consideration, and with notice which, under the definition and authorities above cited, made him a privy to Blackman and therefore bound by the New York judgment.

In other words, Phelan took the conveyance burdened with the equities of Dull. These have been crystallized into the New York decree, and Phelan being a privy in estate, is powerless to resist their enforcement.

We adhere to the statement made upon page 26 of our original brief that "It is solemnly admitted by Phelan and Duffie *upon the record* that they acquired their interests without any consideration and with full notice of the fraud." This statement is reproduced in a garbled form in defendants' brief, page 19. and the statement is said to be too outrageous to be met with the "gentle language of indignant denial," whatever that may mean. The argument in our brief upon this subject was based upon the admissions of the pleadings, and it is perfectly plain that Phelan and Duffie

were said in the cross-petition of the plaintiffs in error to have acquired their interests without any consideration and with full notice of the fraud. This statement of the pleadings was not traversed, and those facts therefore stand admitted upon the record precisely as we have stated; in fact, it has been continuously insisted by us that one of the errors of the Iowa Courts sprang from their having considered evidence on this point, although it appeared "from the record" that that question was settled by the pleadings.

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DEFENDANT'S BRIEF

No. 192.

Brief of Strawn for D. & W.

Filed Jan. 13, 1898.

In the Supreme Court of the United States.

October Term, 1897.

Daniel Dull and Nellie M. Dull, Plaintiffs in Error,

vs.

John E. Blackman, Edward Phelan, Edward R. Duffie and George F. Wright, Defendants in Error.

No. 192.

Error to the Supreme Court of the State of Iowa.

WINFIELD S. STRAWN, *for Defendants Phelan, Duffie and Wright.*

BRIEF OF DEFENDANTS IN ERROR, PHELAN, DUFFIE AND WRIGHT.

In the Supreme Court of the United States.

October Term, 1897.

Daniel Dull and Nellie M. Dull,
Plaintiffs in Error,

vs.

John E. Blackman, Edward Phelan, Edward R. Duffie and George F. Wright, Defendants in Error.

No. 192.

Error to the Supreme Court of the State of Iowa.

WINFIELD S. STRAWN, *for Defendants Phelan, Duffie and Wright.*

BRIEF OF DEFENDANTS IN ERROR, PHELAN, DUFFIE AND WRIGHT.

(Mem:—The figures at the corner of a word, refers to the page of the record printed in this court.)

A full statement of the case is printed in my brief on the motion to dismiss or affirm and need not, I suppose, be repeated here. I beg to refer to said statement and have it considered on this hearing.

Much, also, that is applicable to the merits of the case is argued in that brief, to which I beg to refer; and will try to avoid repeating the same herein.

The alleged New York decree was pleaded by Dulls, first in abatement, and next, to use their own words, as "*a complete adjudication* of the rights of the

parties to this controversy and as a bar to the further prosecution of this action." Let us therefore consider the alleged decree in its various aspects.

1. *The decree does not purport to be one in rem; or profess to establish title in Dull.*

Before going into the legal propositions arising upon the offer of said decree as evidence of the extraordinary action of the courts of another state, let us inquire and ascertain just what that court undertook to do in the premises, before determining what effect, if any, its action could have on the *subject matter* of the Iowa suit. Just what was "adjudged and decreed" by that court is found on page 65 of the record; and it is worthy of notice that such decree does not even purport to act on the subject matter of this suit, but only professes to be a personal decree. It directs Blackman to execute to Dull a deed for the premises, but does not in itself assume to pass the title, either absolutely, or in the event that Blackman does not comply with the order of the New York court. It purports to restrain and enjoin Blackman *et al.* from prosecuting their action in the courts of another state; but it does not for an instant assume to settle the title between these contesting parties or any of them. Nor does the decree profess to act on the subject matter of this suit; but does only assume to lay particular commands upon the parties, or supposed parties, to the suit—which commands if obeyed, either voluntary or under process from the court, would have affected the subject matter of the suit, but which, in the absence of such obedience to such commands, leave the said subject matter (the land) wholly unaffected.

The decree is plainly *in personam* and not *in rem*. And herein can be recognized a knowledge of the law, with which the judges of the courts of that great state

must generally be credited; and we doubt not that it is but simple justice to the judge who signed such alleged decree, to say that he did it under the impression, if not with the express understanding, that those *named* as defendants (including the title holder, Phelan, and mortgagee, Duffie), had *all* been personally served within the jurisdiction of his court, and that he might, therefore, properly render a decree *in personam* which he did not offer to render *in rem*. The decree, then, does not purport on its face to have the effect claimed for it by the appellant.

2. *So far as the decree purports to grant Dull any relief, it does so in a case where he had previously disposed of all his interest in the subject matter of the action.*

Another thing about that decree: It purports to grant relief to Dull long after his pleadings in this case, and evidence show he had deeded the land away; and the grantee, the real party in interest, was not substituted, or indeed made any mention of in said suit and decree. Dull brought his suit in New York November 3, 1892.[12] He filed his cross-petition in this cause February 15, 1893,[13] averring that he had conveyed the Iowa lands to Nellie M. Dull, his wife. This conveyance was September 22, 1892. Eight months after such conveyance, and on May 20, 1893, he pretends to take a decree[65] in *his* favor, in New York and claims that such decree settled *in him* the title to land which he no longer owned. How can this be?

By the laws of the State of Iowa an action must, with excepted cases, be in the name of the real party in interest, and this as well in its progress and decision, as when brought. Code of 1897 §. By his own showing he had parted with his ownership three months before the decree, and his grantee was not sub-

stituted as plaintiff or in any wise named or included in the subsequent proceedings, ending in a decree. What he claims was decreed in his favor in that suit, is negatived and annulled, on his own showing, by his voluntary alienation of the alleged interest with which he began the action; and the fact that his grantee was never made a party to the suit in which the alleged decree was rendered. Our laws require the presence in the suit, at every stage of the proceedings, of the real party in interest; and the laws of New York will, in the absence of a showing to the contrary, be presumed to be the same as the laws of Iowa. Dull conveyed this land and any and all the interest he claimed therein, even *prior to the commencement of his suit in New York.* This is shown by his offer in evidence by himself, of his deed to his wife[81] dated September 22, 1892, and *recorded in Iowa* September 26, 1892, while his pretended New York suit was not brought until November 4th following.[81]

It was for Dull to affirmatively establish every fact necessary to entitle him then or now to claim anything by or on account of his cross-petition; and having shown in that affirmative pleading that he had parted with the interest he once claimed in that land, it was incumbent on him to show that such transfer was at a time which did not bar or affect his right to the relief asked. No presumption can be indulged in his favor where he is required to make affirmative proof, and the proof now shows that such transfer to his wife, was made before even the New York suit was instituted. In any event the decree therein was worthless as to him, and it does not pretend to confer rights upon any other party to this suit.

Suppose, too, that after this transfer to his wife, Dull had commenced an action for damages for injuries done the real estate; or if it were city property, was

prosecuting an appeal from an award of damages for a change of grade, or had brought any kind of a suit for any matter grounded in the ownership of the real estate, could such action be for a moment sustained in the face of the proof that the title was in his wife? It would be impossible. *City vs. Northcutt*, 63 N. W. (Neb.) 807. How much more, then, is the rule applicable when what the plaintiff (the non-owner) claims is the *title* itself?

3. *The decree is void as a decree in rem for want of jurisdiction of the New York Court over real estate situated in Iowa.*

But if the decree were different and did import the character claimed for it by appellant, then upon jurisdictional grounds it is null and void so far as the *subject matter* of this suit is concerned.

That the laws of a state alone govern real estate within its boundaries, is elementary. The statute (Code § 2576) provides that an action "for the recovery of real property, or for an estate therein, or for the determination of such right," "*must* be brought in the county in which *the subject of the action*, or some part thereof is situated." This ought to be conclusive so far as the effect of a suit or decree upon *the land*, as land is concerned; in other words, to bind the subject matter of the suit in an action and by a decree which would *act upon the land* independently of any act of any party to the suit to be by them done or performed. Judged by this statutory test, the New York decree is absolutely null and void.

Even where the land lies within the jurisdiction of the court, jurisdiction must also be duly obtained over the person *in whom is the title*, or the decree is a nullity. This is the principle of *Swan vs. Clarke*, 36 Iowa, 560; and is so axiomatic that the Supreme Court of that state declined to enter into any discussion of that case,

but disposed of it in an opinion of twenty-five lines. So that a decree to operate *of itself* upon real estate, must be in a case both where the land lies within the jurisdiction of the court *and* the title-holder of such land is duly brought under its jurisdiction. *Both* of these requisites must unite in one and the same action; and unless *both* do concur in one and the same case, the decree is but so much waste paper—so far as it is intended to affect the land *as land*. Citations of texts and authorities upon this proposition would, we think, be superfluous.

So the decree of the New York court was worthless as evidence of *title*, even if Blackman had still held the title to the land; but when further viewed in the light of the fact that Blackman had, before that suit was instituted, fully parted with all title to the same, and confirmed that conveyance in the most absolute manner,[38] the utter worthlessness of such decree as an instrument of evidence, is fully apparent. And if its utter worthlessness *could* be detracted from, it would be by the other fact that it was rendered in an action by Dull, *after he* had conveyed away the land; if, indeed, that conveyance had not been made prior to the commencement of his action, as it actually was.[81]

The errors of adverse counsel upon the question of jurisdiction are grave, and the inapplicability of the cases cited is easily pointed out. *Massie vs. Watts*, 6 Cranch 148, was a case in which Watts sought to compel Massie to convey to Watts, lands located in Massie's name, but within a location made under a land warrant owned by O'Neal and assigned to Watts, and placed in Massie's hands, as a common locator of lands. Here was a plain trust created by the act of the parties; and the court, in an action wherein it obtained personal jurisdiction over all the parties, made a decree that Massie, in whom the title still rested, should convey to

Watts. This was a decree *in personam*, and did not, of itself, act upon the land, or profess so to do, but did provide for Massie doing an act, *which act when done, i. e.*, the making and delivery of a deed, would transfer title. But the decree did not claim to make that transfer itself. If Massie did not obey the decree, and himself (not the decree) make a deed as ordered, the court could punish him, but the *title* remained where it was when the suit was commenced. Such is the effect and only effect of a decree made by a court not having territorial jurisdiction of the land. The court itself calls attention to the fact well known to the profession, that actions to enforce a trust are "local and transitory at common law" and "follow the person." But where the judgment is of itself to operate directly on the land and settle the right to the *thing* itself, without regard to any future act to be done by any *person*, the court must have jurisdiction over the *rem* as well as the parties owning or having liens on the same.

In the great case of *Penn vs. Lord Baltimore*, 2d Leading Cases in Equity, 1047, Lord Hardwicke distinctly said the court could not enforce a decree *in rem* in such case if they did make it. He further said (page 1061):

"In the case of Lord Anglesey, of land lying in Ireland, I decreed for distinguishing and settling the parts of the estate, though impossible to enforce that decree *in rem;* but the party being in England, I could enforce it by process of contempt *in personam* and sequestration, *which is the proper jurisdiction of this court.* And, indeed, in the present case, if *the parties want more to be done, they must resort to another jurisdiction.*"

These last italics are those of the original opinion as published, and show conclusively that the realty could not be bound by or even operated on by the decree of a foreign court; but if the plaintiff in the New York suit wanted the court there to do more than com-

pel Blackman, by process of contempt, to make Dull a deed, he "must resort to another jurisdiction," *i. e.*, Iowa; and that the New York court could not settle the title to the land in Iowa or vest that title in Dull, but could only compel Blackman to make a deed for whatever it might prove to be worth.

And such, too, is the express holding in *Gilliland vs. McQuarry*, 89 Ky., 434, cited by appellant and a line of which I quote: "It is true the title to the land is to be affected by the decree *in so far as it compels the party to convey.*"

That is, the title to the land is affected only in the limited or secondary sense of possibly compelling some party to do something *which when done* will affect the land. This is the sole doctrine of this class of cases, and the entire extent of such doctrine, and explains what is meant in this last cited case, that without regard to the location of the land, service on the party where found "*gives the right of action in personam, and the action is in personam for the purpose of enforcing a personal obligation* of contract or trust." This last view of the case has been cited and approved by the Supreme Court of Iowa in *Gilliland vs. Inabit*, 60 N.W. Rep., 211.

If the New York court had any actual jurisdiction over Blackman, that jurisdiction did not extend to the land; but it could "enforce a personal obligation" of his, if any there was, to convey to Dull, but could go no further.

"It is clearly not a judgment *in rem establishing a title in the land*, but operates *in personam only.*" *Hart vs. Sampson*, 110 U. S. on page 155. And in this same case the equity powers of a court are well defined:

"But in such a case, as in the ordinary exercises of its jurisdiction, a court of equity acts *in personam*, by compelling a deed to be executed or cancelled by or

in behalf of a party. *It* has no inherent power, *by the mere force of its decree, to annul a deed, or to establish a title.*"

"A decree cannot operate beyond the state in which the jurisdiction is exercised. It is not in the power of one state to prescribe the mode by which real property shall be conveyed in another."

Watts vs. Waddle, 6 Pet. 391 (400); *Story on Com. Laws*, 7 Ed. § 543.

Then for a judgment to be admissible against third parties, as was offered to be done in this case, it must have been one which did "annul a deed" or *did* "establish a title" and do it of itself. In *McGregor vs. McGregor*, 9 Ia., 65, Judge Wright's opinion, conclusively disposes of the effect claimed for this New York decree when he says (p. 78):

"When the case involves a naked question of title, the courts of a state, other than that where the land is situated, cannot sustain their jurisdiction." And that these courts "having authority to act upon the person may make decrees *not binding on the land itself*, but on the *conscience* of the party in regard to the land."

This is a decision of the highest court of a great state concerning lands within its own territorial limits, is a practical construction of its own statutes as to where suit, to recover lands within its own limits, must be brought, and we think *this* court accepts such construction by a state court of its own lands.

And exactly to the same effect is *Burnley vs. Stevenson*, 24 Ohio St., 474, in the second syllabus and the portion of the opinion referring thereto; while *Carpenter vs. Strange*, 141 U. S., 87, (opinion by Mr. Chief Justice Fuller) seems to us to have settled that the decree of a court of the state of New York, as to the title to lands lying in another state, was a nullity, even where the record title holder and actual owner of such lands, was a resident of New York, was served with the summons in that state and appeared to and defended the suit.

That a state has absolute control over the lands within its borders; and that the title thereto cannot be divested or in any manner be affected by the judgment of any courts but those of such state, and then only when held within such limits or counties as the laws of such state may prescribe, seems indisputable. The provisions of Sec. 1, Art. IV. of the Con. of the U. S. was never intended to allow the courts of one state to settle the *title* to lands in another state; and the claim of such an effect for such a decree, was not, I believe, ever fully asserted until done in this case;—especially where neither the owner of the land—the title holder—nor the land itself was within the jurisdiction of the court, for whose decree such effect is claimed.

A bill for the partition of lands cannot be brought outside of the local jurisdiction of such lands. *Glen vs. Gibson*, 9 Barb., 634; *Ry. Co. vs. Hammond*, 58 Ga., 523.

And in *Roberdeau vs. Rous*, 1 Atk., 543, Lord Hardwicke, who had gone to the lengths he did in *Penn vs. Lord Baltimore*, refused to entertain a bill for the recovery of an interest in real estate in St. Christopher's, saying that "Lands in the plantations were no more under the jurisdiction of this court, than lands in Scotland."

The question in all such cases as this is plainly, then. Are the *lands* to be affected within the jurisdiction of the court which is asked to say and decide who has the title thereto. The statute of Iowa (just quoted) says such court must be held in the very county in which the land lies. In *Pike vs. Hoare*, 2, Eden, 182, the lord Chancellor refused to direct an issue to be made up to try the validity of a will of lands in the colony of Pennsylvania, saying of the laws of the colonies—"they are local." And in the *Penn* case Lord Hardwicke disclaimed any original jurisdiction of

the question of the boundaries between Maryland and Pennsylvania; but said that having the litigants in his power he would make them do what he could not do himself, *put* the boundaries where *he* thought they should be. And if they had not deeded and released as ordered, he could have punished them, but the boundaries would have remained just where his court found them. After all, then, it was the act of the parties, however brought about, and not the decree of his court that settled the disputed line.

This discussion might be much extended and cases cited almost without number to the same point, but we think all must agree that the New York decree was and is without any effect in this case, as even if the court had jurisdiction over Blackman, its decree only required of him to do what he never did, and what the court never, so far as any one knows, attempted to force him to do—*i. e.* some personal act which when done was to affect the title to the lands; but which would not have had any influence on the case or effect on the land, as he had previously conveyed the same to third parties.

4. *Except in cases of "fraud, trust or contract," a court, foreign to the location of the real estate, has no jurisdiction to render a decree in personam, even if all the parties to the title were before said court.*

But the grounds on which *Massie vs. Watts* says that jurisdiction, even in proceedings looking to a decree *in personam*, can be maintained in cases where the land lies without the jurisdiction of the court, will bear analysis in order to determine if that case (a typical one of its class) was at all like the case at bar; or if the grounds of jurisdiction, as they appeared and were illustrated in that case, and in that class of cases, were ever present in the New York case; and to see if

any argument can be drawn from what is there said to be the source of equitable jurisdiction in that case, which has an application to this. That case says:

"In a case of *fraud, trust or contract* * * * the jurisdiction * * * is sustainable wherever the person is found * * * although the land is without the jurisdiction," etc.

Now, taking these grounds in their inverse order, was there any "contract" between Dull and Blackman for the reconveyance of the Iowa land, or any contract, that upon the failure of the title to the New York tract in Dull, the Iowa land should revert to him? There is nothing of the kind. No such contract is anywhere pleaded, or is there any evidence thereof. It is therefore evident that the court had no jurisdiction on the grounds of any contract between Blackman and Dull with reference to this Iowa land—even leaving out of sight the rights of the other parties to this suit.

Next was there any "trust" created between these two men, either express or implied, by the deal of June 28, 1889, by which the Iowa land was to be held for the use and benefit of Dull? There is not even a suggestion of such a thing either in pleading or proof.

Then was it "a case of fraud?" If so, fraud *in what; when*, and with reference to what particular transaction? As we have seen there is not a decent shadow or pretense that the deal of June 28, 1889, was tainted with fraud. It was a plain deal by which Dull acquired the means of harrassing his landlord—the only thing he asked or pretended to bargain for. He got the mortgage he asked, and was conceded the deed which he demanded and had placed *in escrow*. He took—actually took—all he was to have as the consideration for the Iowa lands. His and Blackman's contract—a contract *then fully executed*, was simple, plain and fully understood by both of them and then, being executed, was it not final and conclusive on both, so

far as anything in the *future* was concerned? There was no condition in that June, 1889, contract, either precedent to prevent its going into effect till complied with, or subsequent, the happening of which was to void the title to this Iowa land. Nothing of the kind! How then could the New York court get jurisdiction to cancel the deed or to compel a reconveyance?

Now the fraud alluded to in *Massie vs. Watts* had at the least to be inherent in the very deal by which the title to the land was obtained, and not in some future transaction by which the consideration for the land was lost. If the contrary were the rule then a man who pays cash for a tract of land and receives his deed therefor, may at some future time, by stealing that identical purchase money from the vendor, or by some other act defrauding him out of it—be divested of the title to the land which he had taken by an untainted transaction. No, the "fraud" in the case cited plainly means that fraud by which the title was prevented from vesting in him who furnished the consideration, and was the fraud of and in a particular action. It belonged to the time and place and subject matter then under consideration, and not to some remote or future act by which either might sustain some loss. The only fraud really alleged or with reference to which evidence has been given, was one some months after, and if perpetrated, *was in conveying the New York land to Lyon instead of to Dull.* And if the New York court was to take jurisdiction on account of fraud, it should have been of that fraud, and of its date and its subject matter.

Failure to deliver consideration never invalidated a deed. Said the Supreme Court of Iowa:

"The failure to deliver property agreed upon as the consideration of a conveyance, does not invalidate the deed, but merely furnishes the grantor a right of action for the value of the consideration stipulated."

Lake vs. Gray, 35 Ia., 459.

5. *The New York decree was void even as to Blackman, as he had long prior to the suit parted with all his interest in the land in controversy.*

Still further on the subject of this decree—it is void—so much waste paper even as to Blackman, for the reason that if service really was had on him in New York, he had not at the time the New York suit was brought and never since has had the title to the land which was the subject matter of that suit. Now supposing the rule as to the enforcement of a trust (where one really exists) justifies a court of equity in assuming jurisdiction to enforce the same whenever it finds in its jurisdiction, the one in whom the trust was placed, can such rule be invoked as against one who has parted with the title, and thus gain one step in what is in fact an action to quiet title? Can such a plaintiff, in another action against those who acquired the title, say I have broken your chain of title, I have destroyed your reliance on the deed by which your grantor held, and now it is necessary for you to show to my satisfaction your good faith; the consideration paid and everything necessary to establish affirmatively your title, or I take the land by virtue of my decree(?) in a court which could not pretend to jurisdiction over the land, or over the third parties who are to be thus affected by such decree? A mere statement of such a proposition demonstrates its unsoundness. It is seeking to divest the title of third parties to land by the proceeding of a court which had no jurisdiction either of the land or the parties in whom was the title. We do not believe that if that court had served Wright, Phelan, *et al.* in Westchester County, it could have rendered a decree binding them; for such a suit against them no more sound in "fraud, trust or con-

tract" than did the transaction by which the title to the Iowa land vested in Blackman.

The suit was at best, purely one to quiet title to land and by one out of possession at that, and it has never before been pretended that equity had or could have any jurisdiction in such cases, either over the persons or subject matter, unless the court is held within the jurisdiction where the land is situated. Being purely such a suit, the New York court had no jurisdiction to affect even Blackman in whom the title *had been*, or those claiming, through any under him, by conveyances prior to the time the pretended suit was instituted against him. Such a suit is local in its nature, and the court, besides being required to have original jurisdiction over the subject matter, *as such*, must in that very action have jurisdiction over those in whom the title and other interests are vested, before it can pass judgment on the *act* of a party, from whom the present holders of the land derive their title, by which act said party derived the title he has since transferred. Such adjudication is not. and cannot in its nature be *personal*. It is an adjudication upon a link in the chain of title—sought and intended to affect the *title*—and the jurisdiction so to adjudge is purely local.

We say again that an examination of the pleadings and decree in this pretended New York suit, shows that it was not in fact or in essence a suit to enforce a trust, but was one to quiet the title to land in another state. Being what it was in fact, the court had no jurisdiction of the subject matter; and its decree even as to Blackman was void. In the state of Iowa, where the court had local jurisdiction of the subject matter—the land—the title to which was sought to be quieted—it was held that no valid decree could be pronounced, in the absence of jurisdiction over the party in whom

was the *legal* title. *Swan vs. Clarke*, 36 Ia., 560. How much more then is that true of a case where the court had no jurisdiction either of the land (the title to which was sought to be quieted in said suit) or of the party in whom was that title? The New York decree was therefore a nullity as to *all* parties.

The principles here contended for are also discussed and applied in *Miller vs. Mahaffy*, 45 Ia., 289, where as in *Swan vs. Clarke, sup.* it was held that *no decree* to affect any one, should be rendered until all parties were before the court. And in *McBride vs. Horn*, 48 Ia., 151, the case at bar, so far as this point it concerned, was before the supreme court of that state, and it was there held that the subsequent decree of the court of another state to which the holder of an interest was not made a party, could not affect his interest in Iowa land. Of these two cases we ask a careful perusal, as the text will show them stronger for us than the claim just made. In conclusion we call attention to a point which requires no argument which is—that whatever may be claimed for the New York decree *as against Blackman*, it is the sheerest nullity as against all the other defendants, who (together with the subject matter of the suit) were in other states, and who were never pretended to be served in the state of New York with any notice of such suit, and never appeared thereto.

The supreme court of Iowa found *as a fact*, on an issue directly presented, that there was no decree of a New York court, either (1) as to the land which was the subject matter of the suit, or (2) as to title holder *Phelan* or the incumbrancer, and therefore nothing for it to construe in the case at bar.

6. *The case should not receive consideration by this court, for failure of plaintiffs in error to ask a rehearing*

in the Supreme Court of Iowa, as allowed by the law of that state.

Sections 3201 and 3202 of the Code of Iowa in force at the time this cause was heard in the Supreme Court of that state; and rules 88 to 93 of that court distinctly provide for a rehearing of any cause decided by said court. The record in this cause fails to show that any such application was made to that court. Said sections, as amended, are as follows:

"SEC. 3201. If a petition for rehearing be filed the same shall suspend the decision, if the court on its presentation, or one of the judges if in vacation, shall so order, in either of which case such decision shall be suspended until after the final arguments provided for in the next section.

"SEC. 3202. The party filing a petition for rehearing may make the same an argument or a brief of authorities upon which he relies for a rehearing, and if he desires to make an oral argument in support of his petition, and as upon rehearing, he shall make an indorsement upon his argument, or brief, either in writing or print, stating in substance that the petitioner for a rehearing will ask to be heard orally in support thereof, which notice shall be served with the petition for rehearing upon the adverse party, and deposited with the clerk of the supreme court; and in such case such petitioner and the counsel for the adverse party shall have the right to be heard orally thereon at the next term of said court, or any subsequent term to which the same is continued. In such case it shall be the duty of the clerk to place the cause wherein the petition is filed upon the docket for the next term of the court beginning not less than twenty days after the depositing of the petition, indorsed as aforesaid, in his office."

And said rules of court are as follows:

"SEC. 88. No petition for rehearing shall be filed after sixty days from the filing of the opinion of this court.

"SEC. 89. Written notice of intention to petition for rehearing shall be served on the opposite party and clerk of the supreme court within thirty days after the

filing of the opinion, and if no such notice is served, the petition for rehearing shall not be filed after expiration of such thirty days.

"SEC. 90. The petition for rehearing, if there be no oral argument, shall be the argument of the applicant therefor, and if the court think that such argument requires a reply, it shall so indicate to the other party, and he may make reply within such time as said court shall allow. If the petitioner desire to make an oral argument in support of his petition, he shall indorse in writing or print a notice upon his argument or brief, stating that he will ask to be heard orally, which shall be served on the opposite party and deposited with the clerk. The cause shall then be placed upon the docket for the next term, being not less than twenty days after the filing of the petition, and the petitioner shall have the right to be heard orally at the next term, or at any term to which the case may be continued.

"SEC. 91. All petitions for rehearing shall be printed as required by section 96 hereof, and a copy shall be delivered to the attorney of the adverse party, and, if there be more than one, to the attorney of each, and nine copies to the clerk of this court.

"SEC. 92. The opinions announcing the decisions of this court in cases wherein petitions for rehearing are filed, shall be printed by the petitioners, and copies thereof shall accompany the printed copies of the petitions for rehearing filed with the clerk, or served on the opposite party. [Oct. 2, 1879, Ordered, that rule 92 be suspended in its operation in all cases wherein the opinions of the court are published in the *Northwestern Reporter*, before the petitions for rehearing are filed. Counsel in such cases being required to refer to the number and page of the *Reporter* in which the opinions are printed.]

"SEC. 93. If a petition for a rehearing be filed, the same shall suspend the decision or procedendo, if the court, on its presentation, or one of the judges, if in vacation, shall so order, in either of which cases such decision and precedendo shall be suspended until after final arguments."

It seems to the writer that the aforesaid statutes and rules gave to plaintiffs in error an opportunity of which they should have availed themselves in order to

have a hearing in this court, even in a proper case; and that the record here should show *affirmatively* that such opportunity was improved by them. When such privilege is given to a party and is neglected, he has not used every means afforded him to have a correct determination of his cause by the state court. In other words, where a rehearing in the court of last resort is allowed, and is not taken advantage of, a party has not had the *final* judgment of such court in the true sense of the term. Of course where a petition for a rehearing raised for the *first time* questions which were Federal or otherwise, the petition for rehearing could not be a part of the "record" in the proper sense, on which to prosecute error here. But for the purpose of getting the *final* judgment of the highest court of a state before coming to this court, the opportunity for a rehearing should, I think, be availed of, and such fact be of record here.

* * * * * * * * * *

Within the last few days and since the foregoing was written, I am in receipt of a notification from counsel for plaintiffs in error that their brief on the motion to dismiss or affirm, will constitute their argument on the whole case. An examination of that brief and of its alleged statements of facts, shows that such statements are wholly erroneous and misleading, and by no means state the case now at the bar of this court. If this court relies on such statements the court will be entirely misled. The statement made by the defendants in error, in their brief on the motion to dismiss or affirm, and that made by the Supreme Court of Iowa, as part of its opinion, alone states the case truly and with exact fairness. Then, too, such statements as are found on page 26 of the brief of plaintiffs in error, to-wit: that it is "solemnly admitted by Phelan and Duffie *that they acquired their interests without any considera-*

tion and with full notice of this fraud", are too outrageous to be met with the gentle language of indignant denial; and beside being wholly unfounded, are a reflection on the common sense of the high court from which this cause comes to this court. But such statements are no farther from the facts than each and every other allegation as to the facts, made by plaintiffs in error.

One other matter in their argument deserves attention, to-wit: that Blackman and others attempted to transfer the litigation from the New York courts to the courts of Iowa. The very contrary is the case. Dull attempted that. The suit in Iowa was commenced in February, 1892. In September, Blackman sold and transferred *all* his interest in the land to Phelan, and on the 17th of that month Phelan intervened in the suit, *as the sole party in interest as plaintiff and made Dull a party defendant.*[3] In November following, Dull having (as far back as September 22), conveyed *all* his alleged interest in the land *to his wife*, commenced his New York suit. The suit in Iowa, the true forum, was still pending and continued on to a decree, which was in 1894. That Dull brought his pretended New York suit, on the information of his Iowa attorney, and for the express purpose of evading the Iowa jurisdiction, no one can doubt who has read the *quasi* record which said attorney has had certified to this court. No better commentary on the claims of *fraud* alleged by that counsel, can be made.

The continual cry of fraud which is found on every page—and nearly every line of their printed argument, was disposed of by the decision of the highest court of the state, and upon such questions of fact this court does not, as we understand it, sit as a court of appeals; and will not give any attention to arguments thereon. The main questions here are (1) did the courts of New York have jurisdiction over both the subject matter

of the Dull-Blackman suit, *i. e.*, *the land in Iowa*; and (2) did such court have jurisdiction of the fee owner, Phelan, and the incumbrancer, Duffie; and (3) did such court render a decree which had the same force and effect as a decree of the courts of Iowa would have had, over land in that state, and in a suit in which the owner and mortgagee were actually before said Iowa court. That the New York court did not even attempt to render such a decree as an Iowa court could render, is plain from the record.

On the whole we think, and urge to this court, that the "decree" of the New York court was null and void as to the realty itself, for want of jurisdiction over said realty; was null and void as to Phelan the owner and holder of the title, and as to Duffie, the mortgagee, for want of jurisdiction over either of them; was unavailing to Dull and ineffective against Blackman, because prior to the institution of the New York suit the plaintiff therein, as well as the only defendant before that court, had parted with *all* their respective interests in the Iowa lands; and that the Iowa court, which in the suit brought up to the bar of this court, had unquestionable jurisdiction, both of the land and of all the parties having any interest therein, has rendered a decree as to said land and as to the real parties in interest therein, which your honors will not further inquire into.

Respectfully submitted,

Wm. J. Brown.

Counsel for Edward Phelan, Edward R. Duffie and George F. Wright.

OMAHA, January, 1898.

Syllabus.

DULL *v.* BLACKMAN.

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

No. 192. Argued January 18, 19, 1898. — Decided February 21, 1898.

On June 25, 1889, plaintiff in error, Daniel Dull, being the owner of the tract of land in controversy, conveyed the same by warranty deed executed by himself and wife to John E. Blackman. Blackman, on August 2, 1889, made a deed of the same land to George F. Wright as security for moneys to be advanced by Wright. On the 29th of February, 1892, Blackman commenced this suit in the District Court of Pottawattamie County, Iowa, to compel a reconveyance by Wright on the ground of his failure to advance any money. Prior thereto, and on January 30, 1892, Blackman had executed a deed of the land to Edward Phelan, which conveyance was at first conditional but by agreement signed by the parties on September 15, 1892, was made absolute. On the 17th of September, 1892, Phelan filed his petition of intervention, setting forth his rights in the matter under the deed of January 30 and the agreement of September 15, and also making plaintiffs in error and others defendants, alleging that they claimed certain interests in the property, and praying a decree quieting his title as against all. On January 24, 1893, plaintiff's counsel withdrew his appearance for Blackman, and, upon his application, was allowed to prosecute the action in the name of Blackman for and in behalf of Phelan, the intervenor. On February 2, 1893, the plaintiffs in error appeared in the suit and filed an answer denying all the allegations in plaintiff's petition and in the petition of intervention. On the 15th of that month they filed an amended answer and a cross petition, in which they set up that Blackman had obtained his deed from them by certain false representations, and that a suit was pending in the Supreme Court of the State of New York, in which Daniel Dull was plaintiff, and Blackman, Wright, Phelan and others were defendants, in which the same issues were made and the same relief sought as in the case at bar. On May 29 they filed an amendment to their answer and cross petition setting forth that the case pending in the Supreme Court of New York had gone to decree, and attached a copy of that decree. The suit in the Supreme Court of the State of New York was commenced on the 3d of November, 1892. Blackman was served personally within the limits of that State, but the other defendants therein, Wright, Phelan and Duffie their counsel, were served only by delivering to them in Omaha, Nebraska, a copy of the complaint and summons. No appearance was made by them, notwithstanding which the decree was entered against them as against Blackman, and was a decree establishing the title of Daniel Dull, setting aside the deed made by him and his wife to Blackman, and enjoining the several defendants from further prosecut-

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ing the action in the Iowa court. After certain other pleadings and amendments thereto had been made the case in the District Court of Pottawattamie County, Iowa, came on for hearing, and upon the testimony that court entered a decree quieting Phelan's title to the land as against any and all other parties to the suit, subject, however, to certain mortgage interests which were recognized and protected, but which are not in any way pertinent to this controversy between Dull and wife and the defendants in error. On appeal to the Supreme Court of the State such decree was, on January 21, 1896, affirmed. *Held*, that the decree of the Supreme Court of Iowa was right, and that it should be affirmed.

THE facts in this case are as follows: On June 25, 1889, plaintiff in error, Daniel Dull, being the owner of the tract of land in controversy, conveyed the same by warranty deed executed by himself and wife to John E. Blackman. Blackman, on August 2, 1889, made a deed of the same land to George F. Wright as security for moneys to be advanced by Wright. On the 29th of February, 1892, Blackman commenced this suit in the District Court of Pottawattamie County, Iowa, to compel a reconveyance by Wright on the ground of his failure to advance any money. Prior thereto, and on January 30, 1892, Blackman had executed a deed of the land to Edward Phelan, which conveyance was at first conditional but by agreement signed by the parties on September 15, 1892, was made absolute. On the 17th of September, 1892, Phelan filed his petition of intervention, setting forth his rights in the matter under the deed of January 30 and the agreement of September 15, and also making plaintiffs in error and others defendants, alleging that they claimed certain interests in the property, and praying a decree quieting his title as against all. On January 24, 1893, plaintiff's counsel withdrew his appearance for Blackman, and, upon his application, was allowed to prosecute the action in the name of Blackman for and in behalf of Phelan, the intervenor. On February 2, 1893, the plaintiffs in error appeared in the suit and filed an answer denying all the allegations in plaintiff's petition and in the petition of intervention. On the 15th of that month they filed an amended answer and a cross petition, in which they set up that Blackman had obtained his deed from them by certain false representations, and that a suit

was pending in the Supreme Court of the State of New York, in which Daniel Dull was plaintiff, and Blackman, Wright, Phelan and others were defendants, in which the same issues were made and the same relief sought as in the case at bar. On May 29 they filed an amendment to their answer and cross petition setting forth that the case pending in the Supreme Court of New York had gone to decree, and attached a copy of that decree. The suit in the Supreme Court of the State of New York was commenced on the 3d of November, 1892. Blackman was served personally within the limits of that State, but the other defendants therein, Wright, Phelan and Duffie their counsel, were served only by delivering to them in Omaha, Nebraska, a copy of the complaint and summons. No appearance was made by them. Notwithstanding which the decree was entered against them as against Blackman, and was a decree establishing the title of Daniel Dull, setting aside the deed made by him and his wife to Blackman, and enjoining the several defendants from further prosecuting the action in the Iowa court. After certain other pleadings and amendments thereto had been made the case in the District Court of Pottawattamie County, Iowa, came on for hearing, and upon the testimony that court entered a decree quieting Phelan's title to the land as against any and all other parties to the suit, subject, however, to certain mortgage interests which were recognized and protected, but which are not in any way pertinent to this controversy between Dull and wife and the defendants in error. On appeal to the Supreme Court of the State such decree was, on January 21, 1896, affirmed, from which judgment of affirmance plaintiffs in error have brought the case here.

Mr. Alfred G. Safford and *Mr. Isaac N. Flickinger* for plaintiffs in error. *Mr. Omri F. Hibbard* was on their brief.

Mr. Winfield S. Strawn for defendants in error.

Mr. Justice Brewer, after stating the case, delivered the opinion of the court.

The contention of the plaintiffs in error, and in it is the only question of a Federal nature presented by the record, is that the courts in Iowa did not give that full faith and credit to the decree rendered in the Supreme Court of the State of New York to which under the Constitution of the United States it was entitled. From the foregoing statement of facts it appears clearly that although the suit in the Iowa court was originally commenced by Blackman, and though his name was, under the practice prevailing in Iowa, never dropped from the title of the case, it was by reason of the intervention of Phelan and the orders of the court simply prosecuted in his name for the benefit of Phelan, the intervenor; that this intervention of Phelan, and his petition in support thereof, making the plaintiffs in error and others defendants thereto, was filed on the 17th of September, 1892, nearly two months before the commencement of the suit in New York. It also appears that while Blackman, Phelan, Wright and others were named as parties defendant to the suit in New York, Blackman was the only one served within the territorial jurisdiction, and the only one appearing in that court. The other defendants were attempted to be brought in by service of summons in the State of Nebraska, and never entered any appearance in the suit. It is true the decree in the Supreme Court of the State of New York was entered before the trial of this case in the District Court of Iowa, and the record of the proceedings in the New York court was in evidence at the trial in the Iowa court. It further appears from the findings of fact made by the trial court in Iowa, and sustained by the Supreme Court of that State, that the entire right and title had passed from Blackman to Phelan in September, 1892, nearly two months before the commencement of the suit in New York.

Upon these facts we remark that as the land, the subject-matter of this controversy, was situate in Iowa, litigation in respect to its title belonged properly to the courts within that State, *Ellenwood* v. *Marietta Chair Co.*, 158 U. S. 105, 107, although if all the parties interested in the land were brought personally before a court of another State, its decree would be

conclusive upon them and thus in effect determine the title. The suit in New York was one purely *in personam*. Any decree therein bound simply the parties before the court and their privies, and did not operate directly upon the lands. As said by this court in *Carpenter* v. *Strange*, 141 U. S. 87, 105:

"The real estate was situated in Tennessee and governed by the law of its situs, and while by means of its power over the person of a party a court of equity may in a proper case compel him to act in relation to property not within its jurisdiction, its decree does not operate directly upon the property nor affect the title, but is made effectual through the coercion of the defendant, as, for instance, by directing a deed to be executed or cancelled by or on behalf of the party. The court has no 'inherent power, by the mere force of its decree, to annul a deed or to establish a title.'"

In that suit the only party defendant subject to the jurisdiction of the court was Blackman. The other parties were not served with process within the limits of the State of New York and never entered any appearance in the case. The service attempted to be made by delivering a copy of the summons to them in the State of Nebraska was ineffectual to bring them within the jurisdiction of that court.

"Where the entire object of the action is to determine the personal rights and obligations of the defendants, that is, where the suit is merely *in personam*, constructive service in this form upon a nonresident is ineffectual for any purpose. Process from the tribunals of one State cannot run into another State, and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the State where the tribunal sits cannot create any greater obligation upon the nonresident to appear. Process sent to him out of the State, and process published within it, are equally unavailing in proceedings to establish his personal liability. *Pennoyer* v. *Neff*, 95 U. S. 714, 727.

"Such a decree, being *in personam* merely, can only be supported, against a person who is not a citizen or resident of the

State in which it is rendered, by actual service upon him within its jurisdiction." *Hart* v. *Sansom*, 110 U. S. 151, 155.

We remark again that while a judgment or decree binds not merely the party or parties subject to the jurisdiction of the court but also those in privity with them, yet that rule does not avail the plaintiffs in error, for Phelan acquired his rights prior to the institution of the suit in New York and was therefore not privy to that judgment.

"It is well understood, though not usually stated in express terms in works upon the subject, that no one is privy to a judgment whose succession to the rights of property thereby affected, occurred previously to the institution of the suit. A tenant in possession prior to the commencement of an action of ejectment cannot therefore be lawfully dispossessed by the judgment unless made a party to the suit. . . . No grantee can be bound by any judgment in an action commenced against his grantor subsequent to the grant, otherwise a man having no interest in property could defeat the estate of the true owner. The foreclosure of a mortgage, or of any other lien, is wholly inoperative upon the rights of any person not a party to the suit, whether such person is a grantee, judgment creditor, attachment creditor, or other lienholder." Freeman on Judgments, (1st ed.,) § 162.

As Phelan was not brought within the jurisdiction of the New York court, and as the suit in that court was instituted nearly two months after he had acquired full title to the real estate, the decree of that court did not bind him as a party, nor bind him as in privity with Blackman, his grantor. The Supreme Court of Iowa did not err in so holding.

The decree is

Affirmed.